Supreme Court, U.S.
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92-1560

No. _____

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether, in an action by employees under §301(a) of the Labor Management Relations Act, subsequent to a jury's Special Verdict and a Judgment on liability having been entered concluding that the Defendant successor employer had assumed and breached the collective bargaining agreement in laying off the employees and that the Defendant Union had breached its duty to fairly represent the employees:

1. May the Defendants defend the damage and remedy claims of the employees by asserting that they could have negotiated, but did not, a modification to the provisions of the collective bargaining agreement which the successor employer had breached and, if so, do the employees have the burden to prove that such a hypothetical modification would not have been ratified by the appropriate union membership?

2. Are attorney fees an element of the compensatory damage claims of employees in a §301 action or, alternatively, are attorney fees only awardable under the traditional American rule and, if so, the nature of "bad faith" required?

3. Where the Court, rather than a jury, assesses the damages due an employee in a §301 action, is interest properly awardable from the date of loss in order to make the improperly discharged employee "whole" and, if so, what is the basis for any such award?

PARTIES TO PROCEEDINGS BELOW

Parties to the proceedings below, not listed in the caption, consist of the following individual Petitioners and Respondents:

Petitioners:

Selman (Joe) Thomas, Jr., Lloyd Anderson, David Bell, Dale John Burk, Dennis Canterbury, John Conner, Curtis Cotton, Michael DeJaynes, Ressie Estell, Mary L. Fillbach, Personal Representative of the Estate of Robert Fillbach, Paul Flower, David Foster, Donald Froien, LaCinda George, Personal Representative of the Estate of James George, Eddie Gill, Ivan Heesacker, Robert Hinsley, Shirley Huston, Personal Representative of the Estate of Lewis Huston, Josephine James, Calvin Jewett, Ralph Johnson, Kent Jorgensen, Patricia Livengood, Clyde Moore, Percy Moore, James Nash, Robert Peters, John Pittman, Sylvio Rebolloso, Jane Reed, Wayne Shaffar, Paul Stone, Rose E. Mascarello, Personal Representative of the Estate of James Thompson, James Walker, Clayton Welch, Ishanwee Wrenn, Gerald Carew, Thomas Hayden, Melvin Wade, Jr., William Marsh.

Respondents:

Curtis Burton, Clark Cowing, Tom B. Miller, Donita Wimer, Bernard Von Tersch, Audrey Leahy, Joan Delesene, Mary L. Ardery, Junior Lee Hoxsie, Annie C. Moore, Bob Herman, Gary Wasinger, Barbara Wasinger, Mark Boro, Bessie Sherrod, Richard Timperley, Thomas J. Mathis, William T. Adams, J. Patrick Laughlin, Matthew

PARTIES TO PROCEEDINGS BELOW – Continued

L. Seeman, Mark Martinez, Jim Hudson, John P. Gue, Larry Stryker, Kirk Keller, Steve Keithley, Jack Hotz, Jr., Margaret Hilliard, Carlotta Chapman, Gary Kjar, Jan Hall, David Kunkle, Ronald Black, Homer C. Jackson, Rondell Guffey, Joy Southall, Janelle Swafford, Delores Urkevich, William H. Bailey, Brenda J. Brown, Emma J. Martin, Dave Hawkins, Dana McCoy, Donnie Parks, Bernie H. Bell, Edmon J. Flury, Kathryn Nelson, Carolyn L. Dibelka, William J. Miller, Taral E. Clift, L. Z. Steen, Douglas O'Leary, Rodger Vorderstrasse, Robert Heib, Tim Schneckloth, Alvin Ward, Richard Lindaer, Harold Poppino, Mary Wright, Doug Woodworth, Richard Wills, R. P. Moore, Fred Sherrill, Riley A. Gunter, Richard Carter, Bob Wyskowski, Lorrie Griffis, Barb Griffin, Richard Farris, Donna Adams.

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REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

1. *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company,* (Eighth Circuit Opinion dated December 31, 1992). (App. 1)
2. Memorandum Opinion of the District Court (unreported) October 11, 1991 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 11)
3. Order and Judgment of the District Court (unreported) October 11, 1991 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 31)
4. Order and Judgment of the District Court (unreported) February 24, 1992 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 34)
5. *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company,* 826 F.2d 735 (8th Cir. 1987), *Cert. denied,* 484 U.S. 1062, 108 S.Ct. 1019, 98 L.Ed.2d 984 (1988). (App. 37)
6. Order of the District Court (unreported) August 13, 1986 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 63)
7. Arbitrator's Decision and Award, June 7, 1983. (App. 113)

JURISDICTIONAL STATEMENT

The date of the original Opinion in this case issued by the Court below is December 31, 1992. A Petition for Rehearing and Suggestion of Rehearing en banc was filed on January 8, 1993 and denied on February 12, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 10 of this Court.

STATUTORY PROVISIONS

1. Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a).
2. Section 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §158(d).

STATEMENT OF THE CASE

Historical Facts

The historical facts which gave rise to this litigation are brief and undisputed. These facts are concurrently set forth in the Opinion rendered by the Eighth Circuit with regard to the first appeal in this action, *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local #433 and Metz Baking Company*, 826 F.2d 735 (8th Cir. 1987), *Cert. denied*, 484 U.S. 1062, 108 S.Ct. 1019, 98 L.Ed.2d 984 (1988) (App. 37) and the Pre-Trial Order dated February 28, 1985 (App. 101).

The Petitioners herein were employees of Interstate Brands Corporation ("IBC") employed as production employees in this employer's bakery facility located on Leavenworth Street in Omaha, Nebraska. On February 19, 1983 Metz Baking Company ("Metz"), a competitor, purchased the plant, equipment and routes of IBC, taking possession on February 21, 1983.

The agreement between IBC and Metz was set forth in a purchase agreement executed by both parties. At the time, Metz had an existing bakery facility located on Nicholas Street in Omaha, Nebraska.

Subsequent to consummation of the purchase of the IBC facility, Metz owned and operated two separate bakery facilities in Omaha with two separate groups of employees. Labor relations for each group of employees were controlled by a multi-employer collective bargaining agreement negotiated by Metz, IBC and another bakery with the Union that represented both groups of employees, Bakery, Confectionery and Tobacco Workers Union Local #433 ("Union").

While the collective bargaining agreements applicable to the Nicholas Street plant and the Leavenworth Street plant were identical in terms, they applied, separately, to each bargaining unit at each location.

The collective bargaining agreements at each location, effective from May 2, 1982 through May 5, 1985 provided, in part, at Article X, Seniority, as follows:

> Section 4. In the event it becomes necessary to reduce the working force for the lack of business or other legitimate reasons, the last person hired in the plant shall be the first person laid off and in returning to work the last person laid off shall be the first person recalled, for a permanent full time job.
>
> Section 5. Regular full time employees with thirty (30) days or more seniority in the plant may in the case of lay-off apply their plant seniority as follows:
>
> A. Employees may replace employees in order of seniority.
>
> B. The employees who are laid off and exercise their plant seniority shall carry forward their plant seniority.

Additionally, at Article XVIII, Management, Discharge and Discrimination, no employee could be discharged, except for "just cause".

Upon the acquisition by Metz of the IBC facility it employed the Petitioners, who had seniority rights under the collective bargaining agreement, and all other former IBC employees (part-timers without seniority) and continued the bakery operations at that location without taking job applications or notifying the employees of any change in their employment status.

In March, 1983, Metz decided to close its Nicholas Street production facility, notified the Petitioners herein (Leavenworth Street employees) that it considered them "new hires" with an effective seniority date of February 19, 1983, unilaterally merged the seniority lists of the

Nicholas Street and Leavenworth Street employees and effectively endtailed the Petitioners to the full-time Nicholas Street employees and promptly laid off all of the Leavenworth Street employees on either March 8th or 22nd. Metz transferred the Nicholas Street employees to Leavenworth Street and honored the plant wide seniority of the Nicholas Street employees earned at that facility at the Leavenworth Street facility.

The Union never requested or demanded negotiations with Metz regarding these events or their impact upon both groups of employees and, since it represented both groups, it assumed a "neutral" position with regard to the claims of each group of employees.

Metz and the Union have never negotiated with regard to this matter and the collective bargaining agreement, which provided for continuation of the agreement subsequent to its termination, absent written notice by either party, has been renegotiated on three separate occasions (1985-1988; 1988-1991; 1991-1994) without any change or modification in the above-referenced seniority provisions or with regard to the need for just cause with regard to termination.

The Leavenworth Street employees caused a grievance to be filed alleging a breach by Metz of the Leavenworth Street collective bargaining agreement and the matter proceeded to arbitration.

Arbitration Proceedings

The matter proceeded to arbitration with the question presented being whether or not Metz had breached the Leavenworth Street collective bargaining agreement and, if so, what remedy was appropriate. The Union, while continuing its "neutral" position, represented both groups of employees. The Union's primary witness at the arbitration hearing was the Vice President and General Counsel in charge of labor relations for Metz. This individual testified at the arbitration proceedings that Metz, in its Purchase Agreement with IBC, did not agree to

honor the seniority provisions of the IBC collective bargaining agreement and, further, that IBC was a failing company and that the doors to the Omaha Plant would have soon closed absent the purchase by Metz of this facility. The arbitrator denied the grievance of the Leavenworth Street employees on June 7, 1983 (App. 113).

The §301 Action.

The Leavenworth Street employees, subsequent to a denial of their grievance, engaged their prior counsel and brought this §301 action, federal jurisdiction existing under 29 U.S.C. 185(a) and (c), against Metz, claiming a breach of the collective bargaining agreement and, against the Union, claiming a breach of its duty to fairly represent them. The matter was bifurcated with the issue of liability being tried to a jury. The matters tried to the jury included the Leavenworth Street employees' §301 action and, additionally, the claim that the Union had breached its duty owed to the Leavenworth Street employees under the National Labor Relations Act by not negotiating with Metz with regard to their seniority rights. (App. 106-7).

The liability trial was had in July of 1985 and the jury was instructed with regard to both claims of the Leavenworth Street employees (App. 87) and the jury, pursuant to a Special Verdict (App. 97) determined, with regard to Plaintiffs' §301 action, that: the Union had breached its duty to the Leavenworth Street employees in the manner in which it handled the grievance and arbitration proceedings; that this breach tainted the arbitration award; that Metz impliedly and expressly agreed to be bound by the seniority provisions of the Leavenworth Street collective bargaining agreement; that Metz breached the seniority provisions of this collective bargaining agreement; and, that the Plaintiffs were laid off as a result of Metz' breach of the collective bargaining agreement (Special Verdict questions and answers 3-8).

Additionally, the jury found that the Union breached its duty in not negotiating with Metz regarding Plaintiffs' seniority rights upon Metz' purchase of the IBC facility and that had the Union so negotiated, Metz would not have laid off the Plaintiffs in March of 1983 (Special Verdict questions and answers 1 and 2).

No evidence was adduced that the former IBC facility was a "failing" enterprise. Additionally, the purchase agreement between Metz and IBC contained broad language regarding Metz' express assumption of the IBC labor agreement.

In August of 1986 the Trial Court granted judgment n.o.v. in favor of Metz and the Union, vacated the jury's Special Verdict and entered judgment in their favor (App. 63). The District Court specifically found that since the Nicholas Street employees outnumbered the Leavenworth Street employees, the Union's failure to negotiate on behalf of the Leavenworth Street employees was, at best, a "futile" act and could not be sustained. The Trial Court also found that the Union's actions were at worst merely negligent and that even if the Union did breach its duty to the Leavenworth Street employees, that this breach could not have "tainted" the arbitration award.

The Leavenworth Street employees duly appealed the Trial Court's decision.

The First Appeal

On Plaintiffs' appeal to the Eighth Circuit from the Trial Court's grant of judgment n.o.v. the Eighth Circuit not only reinstated the jury's Special Verdict but, further, directed the entry of a judgment on liability against Metz and the Union. *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local #433 and Metz Baking Company, supra.* (App. 37).

The Eighth Circuit concluded that the jury was correct in its determination that Metz was bound by the seniority provisions of the Leavenworth Street collective bargaining agreement, had breached those provisions and had wrongfully laid the Plaintiffs off. The Eighth Circuit

found that the Union had lied to and deceived the Leavenworth Street employees and had failed to fairly represent them with regard to the grievance and arbitration proceedings. The Eighth Circuit also directed the Trial Court in footnote 1, with regard to the Union's failure to negotiate on the Leavenworth Street employees' behalf, to determine who would have voted with regard to any negotiated resolution in order to assist the Trial Court in determining the range of solutions which would have been possible with regard to any such negotiations.

The Eighth Circuit remanded this matter to the District Court for a determination of appropriate remedies due the Leavenworth Street employees.

Subsequent to the denial by the Eighth Circuit of a motion for rehearing by Metz and the Union, these parties filed a Petition for Writ of Certiorari with this Court which was denied in February of 1988.

On Remand

Upon the return of this matter to the District Court a judgment on liability was entered in favor of the Leavenworth Street employees and against Metz and the Union in August of 1988. The Trial Court also allowed the former Nicholas Street employees to intervene as defendants in this action. Additionally, the Trial Court allowed Metz and the Union to amend their respective answers to assert, as a defense to the damage and remedy claims of the Leavenworth Street employees, that Metz and the Union could have negotiated with regard to the merger issue in 1983 and, if they had done so, an agreement modifying the collective bargaining agreement extinguishing the seniority rights of the Leavenworth Street employees and endtailing them to the Nicholas Street employees would have been agreed to, submitted to the joint group of Nicholas Street and Leavenworth Street employees and ratified thus, extinguishing any claim for damages or remedies by the Leavenworth Street employees.

Subsequent to the remedy/damage trial which spanned almost two months (15 to 18 days of actual trial), the District Court entered its Memorandum Opinion on October 11, 1991 (App. 11). On this same date the Trial Court entered its Order and Judgment (App. 31) granting the Leavenworth Street employees damages only for the period from their lay offs in March to June 15, 1983 against all Defendants. Subsequently, the Trial Court's Order and Judgment was modified to clarify that Judgment was entered only against Metz and the Union and that the Interveners were dismissed as parties to the action. (App. 34).

The Trial Court, in limiting the remedy and damages due the Leavenworth Street employees, relied upon the previously referred to footnote in the prior Eighth Circuit Court Opinion to conclude that Metz and the Union were not bound by the collective bargaining agreement in existence but, rather, that the remedy due the Leavenworth Street employees was limited to the time period during which the Trial Court believed it would have taken Metz and the Union to have negotiated and had ratified an agreement extinguishing the Leavenworth Street employees' seniority rights. The Court stated:

> . . . It would have been possible for Metz and the Union to have negotiated a solution to the post-merger seniority problem and proposed it to the Union membership for ratification. If the collective bargaining agreement had been modified, then there could not have been a grievance based on breach of contract and, therefore, no need for arbitration. (App. 18).

The Trial Court further concluded that the burden was on the Leavenworth Street employees to prove that any such hypothetical negotiated agreement between Metz and the Union, extinguishing their seniority rights, would not have been ratified by the joint group of Nicholas and Leavenworth Street employees. The Court stated:

> Accordingly, the task facing this Court is to determine, to the extent possible, how the seniority rights of all post-merger Metz employees, including those of the former IBC employees, would have been modified had the Union and Metz negotiated the merger. Such negotiated changes would have to be ratified by a majority vote of the eligible membership . . . the burden was on the plaintiffs to show that such contractual changes would not have been ratified, and it is clear from the evidence presented at trial that they could not and did not carry that burden. (App. 18).

Considering the above, even more intriguing and, perhaps, paradoxical is the following passage from the Court's Opinion:

> Although plaintiffs cannot prove they would have suffered any loss after the collective bargaining agreement would have been modified and, therefore, are not entitled to any remedy after that date, the jury specifically found that they would not have lost their full-time positions had Metz and the Union complied with the collective bargaining agreement as it existed at the time of the layoffs. The necessary conclusion, therefore, is that the plaintiffs would have had their jobs until the collective bargaining agreement was modified and were wrongfully denied the income they would have earned under the existing agreement. (App. 20).

The trial Court denied the Leavenworth Street employees' request for attorney fees determining that attorney fees were not properly a component of the compensatory damage claim of the Leavenworth Street employees and that bad faith had not been proved to the satisfaction of the Court. (App. 29). The Trial Court, additionally, denied the Leavenworth Street employees' request for interest on all sums due them from the date of the loss. (App. 32).

The Leavenworth Street employees, once again, duly appealed the decision of the Trial Court.

The Second Appeal

The Eighth Circuit affirmed the Trial Court in all respects. The Appellate Court summarily dispelled any notion that the Trial Court had misinterpreted its prior Opinion. The Appellate Court concluded that Metz and the Union would have had to have negotiated in 1983 and that since Metz consolidated operations and had a surplus of employees, that it was merely unfortunate for the Leavenworth Street employees that, since lay offs were required, they were the individuals who would have been laid off in any case. The Court stated:

> . . . Since Metz could not have kept all of the employees from both workforces, and the collective-bargaining agreement had no provision governing labor in the event of a corporate merger, the collective-bargaining agreement would have had to be modified. In footnote 1 we ordered the District Court to determine when that modification would have been if proper negotiations had in fact taken place. (App. 3).

The Eighth Circuit, utilizing, with liberality, the abuse of discretion standard, found no error in the Trial Court's denial of attorney fees and interest.

The Petition for Rehearing filed by the Leavenworth Street employees on January 8, 1993 was denied on February 12, 1993. (App. 85).

ARGUMENT

I. THE DAMAGE AND REMEDY CLAIMS OF AN EMPLOYEE UNDER A §301 ACTION ARE MEASURED AND CONTROLLED BY THE COLLECTIVE BARGAINING AGREEMENT IN EXISTENCE.

The claims of the Leavenworth Street employees against Metz for breach of contract and against the Union

for breach of its duty regarding the grievance and arbitration proceedings arise under §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Just as the claims of the Leavenworth Street employees with regard to their contractual seniority rights are dependent upon and measured by the collective bargaining agreement in existence, so, too, the remedy or damages due the Leavenworth Street employees must be measured by this same collective bargaining agreement. The Eighth Circuit's acceptance of the District Court's speculation of what might have occurred in 1983, had Metz and the Union negotiated, is explicitly contrary to the most fundamental precept underlying labor relations; that the parties to a collective bargaining agreement are bound by that agreement until such time as the agreement is properly or "legally" modified. No such modification has ever occurred and, in fact, Metz and the Union have never even negotiated with regard to the Leavenworth Street employees' seniority rights nor the "merger" issues.

The Leavenworth Street employees, having borne the rather heavy burden of proving that Metz assumed the collective bargaining agreement and breached the seniority provisions in laying them off and, also, in proving that the Union had failed to fairly represent them, were granted a back pay award limited solely to net lost wages and holiday pay for an approximate three month period. The Trial Court and the Eighth Circuit even denied the Leavenworth Street employees any damages

with regard to other economic losses such as pension benefits or contributions, vacations, health insurance out-of-pocket losses, overtime wages and the like. Nor were damages awarded to Petitioners for lost seniority or future damages. The Leavenworth Street employees submit that, absent a "legal" modification of the relevant terms of the collective bargaining agreement, their claims for an appropriate remedy must be measured by the same collective bargaining agreement upon which they were required to base their claims with regard to the liability portion of this action.

Section 8(d) of the National Labor Relations Act provides, in part, as follows:

> [W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
>
> The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract . . . 29 U.S.C. §158(d) (App. 126).

Metz and the Union, by reason of §8(d), were both bound to honor the collective bargaining agreement which Metz, as a successor employer, expressly assumed. Notwithstanding repeated renegotiation of this agreement and the failure to ever attempt to negotiate or modify this agreement in any material respect with regard to the issues involved in this litigation, neither Metz nor the Union have ever honored the Leavenworth Street collective bargaining agreement and, in fact, can only respond to the remedy and damage claims of the Leavenworth Street employees by claiming that *had* they negotiated, they would have extinguished those seniority rights which continue to this very day.

This Court in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), in discussing the impact of a successor employer being bound by the substantive provisions of the prior employer's collective bargaining agreement, at pages 288-9, 1582-3 and 73-4 stated:

> It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with the provisions of the contract and subject

> to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. Nor would the union commit a §8(b) (3) unfair labor practice if it refused to bargain for a modification of the agreement effective prior to the expiration date of the agreement. A successor employer might also be deemed to have inherited its predecessor's pre-existing contractual obligations to the union that had accrued under past contracts and that had not been discharged when the business was transferred . . . (footnotes omitted).

This view was reiterated in this Court's decision of *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board, et al.*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed2d 46, 261-2, 2243 and 56 (1974).

The Petitioners herein suggest to this Court that the Eighth Circuit, in adopting whole-heartedly the decision of the Trial Court, has closed its eyes to this Court's prior Opinions and §8(d) of the NLRA. The Eighth Circuit's conclusion that Metz and the Union would have had to have negotiated in 1983 regarding the merger may be a proper statement of what could have occurred if, in fact, Metz and the Union wished to accord the Nicholas Street employees any greater seniority rights than that dictated by the Leavenworth Street agreement. However, history reflects that no such negotiations have ever occurred. The jury's Special Verdict confirmed Petitioners' seniority rights and determined that the collective bargaining agreement had been breached resulting in their wrongful termination. §8(d) of the NLRA uncategorically requires

both Metz and the Union to honor the collective bargaining agreement and the seniority rights of the Petitioners.

For the Eighth Circuit to suggest that the collective bargaining agreement did not address the issue of seniority rights is to ignore the clear and unambiguous terms of the agreement regarding plant wide seniority. While Petitioners acknowledge that there is no specific provision of the contract which uses the word "merger", the jury had already specifically found that the contract, as written, protected the Petitioners from layoff by reason of their plant wide seniority. This was and is the law of the case. *In Re: Sanford Fork & Tool Co., et al.*, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 (1895) and *Bethea v. Levi Strauss and Co.*, 916 F.2d 453 (8th Cir. 1990).

Any suggestion that Metz was required to consolidate production in one facility or was required to lay off any employee is an assumption without foundation. These were business decisions, assumedly profitable ones, made by Metz which just happened to breach the collective bargaining agreement at the Leavenworth Street facility. As this Court indicated in *W.R. Grace and Co. v. Rubber Workers Local #759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298, 113 LRRM 2641 (1983) economic necessity is not a recognized defense to a breach of contract claim. Just as the employer in *W.R. Grace, supra*, sought to have its male employees bear the loss of its ill-fated decision to follow an agreement with the EEOC, so too, here, Metz seeks to have the Petitioners bear the loss for its business decision to lay off employees, albeit that decision breached the collective bargaining agreement.

The Eighth Circuit viewed the remedy claims of the Petitioners in relation to the rights and status of the Nicholas Street employees, most of whom are still employed by Metz. This simply begs the issue. While the Petitioners have never requested that any former Nicholas Street employee presently employed by Metz suffer a loss of employment, the issue presented and decided at the liability trial was the claim of the Petitioners to superior seniority rights as between the two

groups of employees. Layoffs under the contract were controlled by plant wide seniority. The Nicholas Street employees had no plant wide seniority at the time of the layoffs and the collective bargaining agreement has never been modified to provide them any such seniority.[1] Petitioners do not suggest that the Nicholas Street employees should pay the price for the wrongdoing of Metz and the Union. Just as in *W.R. Grace, supra,* the employer and the union are responsible for the wrongful termination of Petitioners' employment. The wrongdoers, Metz and the Union, are the responsible parties to bear any loss sustained by the Petitioners associated with their breach of contract claims pursuant to the existing contract.

The Eighth Circuit's Opinion is contrary to every opinion issued by this Court or any other Circuit Court which requires that the remedy due the Petitioners be based on the collective bargaining agreement in existence rather than a hypothetical contract based upon hypothetical negotiations and a hypothetical ratification. In fact, the Eighth Circuit's Opinion is contrary to its own hallmark decision in *Richardson v. Communication Workers of America, AFL-CIO,* 486 F.2d 801, 806 (8th Cir. 1973) wherein it explicitly set forth the manner in which damages were to be measured in §301 actions. The period of time for which damages are due from the wrongdoers, Metz and the Union, cannot be limited by the inventive

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[1] The Nicholas Street employees did not have 30 days or more seniority in the Leavenworth plant nor did they have any Leavenworth plant seniority to exercise with regard to any layoffs even assuming that the unilateral action of Metz in merging the two seniority lists did not itself violate the bargaining agreement. In *Teamsters Local No. 42 v. NLRB,* 825 F.2d 608 (1st Cir. 1987) at pages 612-614 the First Circuit considered the seniority rights of two separate bargaining units at separate plants upon a consolidation at one of the plants or at an entirely new facility and reached the same conclusion as the jury in this action, plant wide seniority at one plant does not transfer to another location.

and self-serving claims of the wrongdoers that they could have modified the seniority provisions of the collective bargaining agreement which the company had breached. Historical fact confirms that this claim of Metz and the Union is without merit.

Research with regard to this somewhat novel defense asserted by Metz and the Union has resulted in finding only one other reported decision in which an employer or union sought to defend an employee's §301 action by asserting a claim that the defendants could have renegotiated the collective bargaining agreement to provide for endtailing of the plaintiffs, contrary to the contract's explicit provisions, and were therefore free to disregard the seniority provisions of the contract *Lewis v. Tuscan Dairy Farms, Inc., et al.*, 752 F.Supp. 116 (S.D.N.Y. 1990). That Trial Court found that the union's refusal to follow the fixed rules and standards of the collective bargaining agreement with regard to seniority rights constituted a breach of its duty and that the union was not free to simply ignore the terms of the contract. The Court then stated:

> That is not to say that the union could not have renegotiated the contract, as it did to deal with the crisis created by the Farmland decision, to provide for endtailing rather than dovetailing of seniority, even though to do so would have disserved the Ozone Park employees. That it could have done, so long as it complied with all rules applicable to ratify such an amendment. PAPCIN V DICHELLO DISTRIBUTORS, Inc., 697 F.SUPP 73, 81 (D.Conn.), aff'd, 862 F.2d 304 (2d Cir.1988); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir.1974). It was not free, however, simply to disregard the contract . . . *supra* at 124.

Interestingly, the lower court in *Tuscan, supra,* in reaching its conclusion, relied not only on *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) but also on an Eighth Circuit decision, *Butler v. Teamsters Local 823,*

514 F.2d 442, 453-54 (8th Cir.), *cert. denied*, 423 U.S. 924, 96 S.Ct. 265, 46 L.Ed.2d 249 (1975). In *Butler, supra*, the Eighth Circuit concurred that a union breaches its duty to the plaintiffs by not insisting that the employer adhere to the contract's seniority provisions. Likewise, in the instant action, the Union has never taken any action to require Metz to abide by the terms of the collective bargaining agreement regarding the Petitioners' seniority rights.

Perhaps even more disconcerting is the Eighth Circuit's confirmation of the Trial Court's conclusion that the Petitioners bore the burden of proving that the hypothetical agreement, which assumedly would have been effected by reason of hypothetical negotiations, would not have been ratified by the appropriate Union membership. While such an obligation might exist with regard to an action premised purely upon the failure of a union to properly negotiate on Petitioners' behalf, Petitioners sought only a declaratory judgment and nominal damages with regard to the Union's failure to negotiate and premised their damage claims upon the §301 action.[2] The transposition of the Petitioners' burden of proof, applicable to a failure to negotiate claim to their §301 claim, is an emasculation of federal labor law with regard to §301 actions.

In its truest sense, the Eighth Circuit's Opinion allows a Trial Court to modify, retrospectively, the collective bargaining agreement between the wrongdoing

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[2] Several Circuit Courts have indicated that a plaintiff has the burden to prove, in a failure to negotiate action, not only the terms of the alleged agreement between the union and employer but, also, that such an agreement would have been ratified. See *Anderson v. United Paperworkers International Union AFL-CIO*, 641 F.2d 574, 580 (8th Cir. 1980), *Wood v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 406*, 807 F.2d 493, 502-3 (6th Cir. 1986) and *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018-20 (3rd Cir. 1977).

Defendants, as claimed by the wrongdoers, to the detriment of the wrongfully laid off employees, the third party beneficiaries of the agreement. Even more fatal to the position adopted by the Eighth Circuit, this retroactive modification is accomplished in the face of historical fact reflecting the failure of Metz and the Union to have so modified the collective bargaining agreement through negotiations and submission of any such proposed changes to the appropriate membership.

No court can modify a collective bargaining agreement entered into between an employer and a union, absent an illegal provision, either for the benefit of the employer and union or, contrarily, for the benefit of the employees seeking to establish their rights in a §301 action. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 100 S.Ct. 410, 62 L.Ed.2d 394 (1979) at 219, *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), at 576 and *W.R. Grace and Co. v. Rubber Workers Local #759, supra.*

The Circuit Court's Opinion, just as the Trial Court's decision, conveniently ignores the duty owed by the Union and the majority group of employees to a minority group such as the Petitioners. This duty is set forth in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). Several Courts have determined that, absent an "objective justification" by the union and majority group of employees, established seniority rights of a minority group may not be diminished. *Barton Brands v. NLRB*, 529 F.2d 793, 799 (7th Cir. 1976), *Deboles v. Trans World Airlines, Inc., supra*, at 1016 *Hargrove v. Brotherhood of Locomotive Engineers, et al.*, 116 F.Supp. 3, 7-8 (U.S.D.Co. 1953) and *Teamsters Local Union No. 42 v. NLRB, supra*, at 611-14.

Absent a reversal of the Eighth Circuit's decision in this matter, employers and unions in future §301 actions will be allowed to sit and watch as a plaintiff employee attempts to prove a breach of collective bargaining agreement and breach of the union's duty based upon the

existing agreement and then, if necessary, defend any damage claims by jointly asserting that they could have modified the terms of the collective bargaining agreement which the employer had breached. Then, at least according to the Eighth Circuit's decision in this case, the issue left to the Trial Court is whether the employee can then prove a negative; that the appropriate union membership would not have voted to ratify any such hypothetical renegotiated agreement.

If, in fact, the employee could not prove that a majority would not have ratified such a hypothetical agreement, the "successful" employee would be allowed damages solely for the time period which the Trial Court would determine, by its inference or intuition, that it would have taken the defendants to have so renegotiated and had ratified such an agreement. Petitioners suggest that §8(d) of the NLRA compels a rejection of the approach taken by the Eighth Circuit with regard to this matter. Metz and the Union are bound by the collective bargaining agreement which has been in existence since the wrongful layoffs of the Petitioners in March of 1983.

II. IN A §301 ACTION BY AN EMPLOYEE, ATTORNEY FEES ARE AN ELEMENT OF COMPENSATORY DAMAGES.

The Trial Court in this action refused to award the Petitioners attorney fees. The Trial Court stated as follows:

> Plaintiffs argue that they should be allowed to recover the attorney fees as an element of damages, not as fees per se. Although other circuits have allowed such recovery, *see e.g. Scott v. Local Union 377, International Brotherhood of Teamsters, etc.*, 548 F.2d 1244, 1246 (6th Cir. 1977), the Eighth Circuit has expressly held that attorneys' fees may not be considered as compensatory damages. *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978) ("Attorney's fees

> incurred in bringing a §301 action do not rise to the status of compensatory damages"). Attorneys' fees will not be awarded . . . (App. 29).

The Eighth Circuit determined that the Trial Court's determination that attorney fees were not properly awardable under the bad faith exception to the traditional American rule regarding the award of attorney fees was not an abuse of discretion. (App. 8). The Eighth Circuit's view that attorney fees are not a portion of an employee's compensatory damage claim in a §301 action was originally stated in *Richardson v. Communication Workers of America*, 530 F.2d 126, 132, (8th Cir. 1976). This view is shared by the Eleventh Circuit as expressed in *Varnes v. Local 91 Glass Bottle Blowers, etc.*, 674 F.2d 1365, 1369 (11th Cir. 1982) and by the District of Columbia Circuit in *Washington Hospital Center v. Service Employees International Union, Local 722, AFL-CIO*, 746 F.2d 1503, 1509 (D.C. Cir. 1984).

The position of the Eighth Circuit that attorney fees are not properly part of the compensatory damages due an employee in a §301 action is contrary to this Court's decision in *Vaca v. Sipes, supra* and *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970). *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) did not overrule these Supreme Court cases.

Whether *Alyeska Pipeline, supra*, has modified *Vaca v. Sipes, supra*, regarding whether attorney fees are part of an employee's §301 compensatory damage claim has been addressed in several other Circuits. Except for the Eighth Circuit, Eleventh Circuit and District of Columbia Circuit, the other Circuit Courts which have addressed this issue have been unanimous in their disapproval of this position. The Third Circuit, in *Ames v. Westinghouse Electric Corp.*, 864 F.2d 289 (3rd Cir. 1988), stated:

> . . . The claim that the Union breached its duty of fair representation is predicated upon the duties which are imposed by the federal labor law on collective bargaining representatives

> with respect to the enforcement of collective bargaining agreements. Among those duties is the fair and prompt consideration and, if dictated by controlling legal standards, processing on behalf of employees of their claims under contract dispute resolution procedures. Absent the alleged breach of that duty, Ames would not have been required to retain an attorney in order to pursue his contract remedies against Westinghouse. When there is a legal duty to provide representation, whether that duty arises out of a contractual undertaking or, as here, by operation of law, if the representation is wrongfully withheld, the cost of substitute representation should be recoverable damages. This is not to say that in the suit against the Union fee shifting as such would be appropriate. Rather, the employee should recover as damages from the Union only the attorneys' fees incurred in pursuing the section 301 claim against the employer – consequential damages flowing from the Union's alleged breach of its duty of fair representation. We join those courts of appeals which have so held. *See, e.g., Bagsby v. Lewis Bros, Inc. of Tenn.*, 820 F.2d 799, 801 (6th Cir.1987); *Zuniga v. United Can Co.*, 812 F.2d 443, 454-55 (9th Cir.1987); *Stanton v. Delta Air Lines*, 669 F.2d 833, 838 (1st Cir.1982); *Seymour v Olin Corp.*, 666 F.2d 202, 215 (5th Cir. Unit B Jan. 1982); *Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439, 444 (4th Cir.1980); *see also Bygott v. Leaseway Transp. Corp.*, 637 F.Supp. 1433, 1442 (E.D.Pa.1986); *Chuy v. National Football League Players Ass'n*, 495 F.Supp. 137, 141 (E.D.Pa.1980). *Supra* at 293.

The First, Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuits have concluded that attorney fees are properly a portion of the compensatory damages due an employee in a §301 action. The Seventh Circuit, in *Bennett*

v. Local Union No. 66, 958 F.2d 1429, 1439-40 (7th Cir. 1992), subsequent to concluding that an employee was allowed to recover, as compensatory damages, not only back pay, but also, attorney fees reasonably incurred to press the claim against the employer further stated:

> We do not agree with the Union's contention that this rule is a "judicially created exception" to the American rule against fee-shifting. A central purpose of the American rule is to avoid penalizing the losing party simply because it chose to defend or prosecute a lawsuit. *See Summit Valley Industries, Inc. v Local 112, United Bhd. of Carpenters*, 456 U.S. 717, 724, 102 S.Ct. 2112, 2116, 72 L.Ed.2d 511 (1982). In the present context, however, the fees are not awarded as a penalty, but rather as proximate consequential damages for the union's failure to provide representation: the expense that Bennett has incurred in pursuing her contractual grievance against the Company "is not merely a result of the harm that [the Union] did [her]; it is the harm itself." *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275 (9th Cir.1983). To avoid conflict with the American rule, courts generally limit fees awarded as damages in hybrid section 301 cases to the expenses incurred in pursuing the claim against the employer, and not the claim against the union. *See, e.g., id.* at 1275 & n.3; *Ames*, 864 F.2d at 293. Here, however, the employer and the Union participated in each other's breach; indeed, the Company's breach of the labor contract in this case depended upon the Union's abandonment of its representation. Because we agree with the district court that the fees incurred in both components of this hybrid action were "necessarily intertwined," we conclude that the award of all reasonable attorney's fees as damages was proper. (footnote omitted). *Supra* at 1440.

In the instant action, the Trial Court found joint and several liability having determined that both Defendants should bear equal responsibility and that Metz had participated in the Union's breach of duty. (App. 28) Attorney fees should have been awarded as compensatory damages to the Petitioners. This Court should accept this matter and resolve the split among the Circuits with regard to this issue.

Even if the traditional American rule is to be followed, the bad faith exhibited by both Metz and the Union, as reflected in the Opinion of the Eighth Circuit on the first appeal on this matter (App. 37), justifies an award of attorney fees based upon bad faith.

III. IN A §301 ACTION, INTEREST IS TO BE AWARDED IN ORDER TO MAKE THE EMPLOYEE WHOLE.

The Petitioners at the Trial Court level had requested interest on their backpay awards in the same manner that the NLRB grants interest on backpay awards ordered by it.[3] The NLRB has determined that, on backpay due, interest accrues commencing with the last day of each calendar quarter of the backpay period for the amount due and owing for each quarterly period, until paid, and computed at the "short-term Federal rate" for the underpayment of taxes to the IRS. See *New Horizon*, 125 LRRM 1177 at 1178. The Trial Court did not address this issue in its Memorandum Opinion but did provide in its Order and Judgment "No prejudgment interest is awarded." (App. 32).

The Eighth Circuit affirmed the Trial Court and stated as follows:

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[3] The Trial Court received into evidence the reports of Petitioners' expert for each Petitioner reflecting lost wages, fringe benefits and interest for each calendar quarter from March, 1983 through 1990, based upon the rate utilized by the NLRB. Exhibits 1(b) through 40(b).

> With respect to the prejudgment interest, the plaintiffs argue that the District Court abused its discretion by denying it since, they claim, it is ordinarily granted absent bad faith, dilatoriness, or the assertion of frivolous claims on the part of the plaintiff. Plaintiffs have misstated the proper legal standard. Like attorneys' fees, an award of prejudgment interest is within the discretion of the trial judge; it is never automatic. We see no evidence here that the District Court abused its discretion. (App. 8).

This is not a case where a jury was asked to determine damages and the Petitioners were requesting the Trial Court, thereafter, to award interest. Rather, the remedy and damage claims of the Petitioners were tried to the Court. The true question at issue is not whether the Trial Court abused its discretion, since the Trial Court did not benefit the Eighth Circuit with any statements or reasons as to why interest was not allowed, rather, the issue is whether interest should have been allowed, just as the NLRB allows interest, on backpay awards in order to make the Petitioners "whole". Additionally, if interest is to be allowed, the question arises as to the appropriate interest rate to be utilized and whether state law is to be referred to in determining that interest rate.

This Court has addressed the issue of the allowance of interest on a monetary recovery from the date of loss in *Board of Commissioners of the County of Jackson v. United States of America*, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313, (1939) and *Blau v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed.2d 403, (1962) wherein this Court stated:

> . . . This Court has said in a kindred situation that "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." *Board of Commissioners v United States*, 308 U.S. 343, 352. *Supra* at 414.

The First Circuit has addressed this issue in *Colon Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933, (1st Cir. 1992) and stated as follows:

> . . . In *Red Star Express Lines v. International Brotherhood of Teamsters Local 170*, 809 F.2d 103 (1st Cir.1987), we held that it was appropriate for the court in an action brought under the Act to grant pre-judgment interest. The court has proper discretion under its equitable powers to do so as long as the interest deals with tangible losses. *Id.* at 107. *See also De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir.), *cert. denied*, 400 U.S. 877, 91 S.Ct. 117, 27 L.Ed.2d 114 (1970). In the instant case, the district court granted pre-judgment interest on tangible losses – lost earnings. We conclude that the court did not err in granting pre-judgment interest. *Supra* at 941.

The First Circuit also determined that the appropriate rate of interest to be utilized was one gleaned from the law of the state where the case arose.

The Petitioners suggest to this Court that interest should be provided on backpay awards under §301 actions by an employee in an identical fashion and for the same reasons as interest is awarded on backpay awards by the NLRB. The Board awards interest as a matter of right in order to make an employee "whole". The fact that the Board may not accept an employee's challenge to the actions of an employer and a union as an unfair labor practice and that an employee is required to file suit under §301 should not diminish the employee's recovery. Whether an employee pursues a vindication of his individual rights under a §301 action or the Board pursues those rights in an unfair labor practice proceeding, the remedy provided, in order to make the employee whole, should be a consistent remedy. Federal labor policy, to be consistent, demands that the remedy due an employee under either a Board proceeding or under a §301 action be consistent.

In the instant action where over ten years has elapsed since the wrongful termination of the employment of each of the Petitioners, it can hardly be argued that it would be "inequitable" to award interest on the backpay award due the Petitioners.

The rationale previously advanced by the Eighth Circuit with regard to interest on backpay awards in proceedings before the NLRB is persuasive and applicable to the claim of the Petitioners for an award of interest. In *Marshfield Steel Company v. NLRB*, 324 F.2d 333 (8th Cir. 1963) the Eighth Circuit stated:

> We accordingly conclude that the Board acted well within its power in providing for the payment of interest on back pay awards. Such awards are in no sense penalties such as were involved in Rodgers. They were not to punish or deter but to *compensate* for the loss sustained by the employees who were wrongfully discharged. They are entirely remedial in character. Republic Steel Corp. v. N. L. R. B., 1940, 311 U.S. 7, 10, 61 S.Ct. 77, 85 L.Ed.6; N. L. R. B. v. Cape County Milling Co., 8 Cir., 1944, 140 F.2d 543, 546. To make such employees whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable. During that period the petitioner had the use of the money it wrongfully withheld and we can see no reason why it should not pay for its use. Based upon the Supreme Court's statement in Rodgers, we concur with the Second and Fourth Circuits and the Court of Appeals of the District of Columbia that the provision for the payment of interest on back pay is proper and within the Board's power. *Supra* at 338.

There are no facts in this action which would support even a suggestion that an award of interest would be inequitable. Petitioners cannot be made "whole" without such an award. The failure of the Trial Court and the

Eighth Circuit to enunciate any basis to justify the refusal to award interest is fatal to the position of the Eight Circuit. The Eighth Circuit itself has previously held that the failure of the Trial Court to set forth adequate grounds for the denial of interest, in and of itself, requires reversal and the award of interest. *Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F.2d 239, 242 (8th Cir. 1981) and *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 752 (8th Cir. 1986). In *Cargill, supra*, the Court, at 241-2 stated:

> Generally, the award of prejudgment interest, in the absence of statutory directives, rests in the discretion of the district court. *Mid-America Transportation Co. v. Rose Barge Line, Inc.*, 477 F.2d 914, 916 (8th Cir. 1973); *see also Lodges 743 & 1746, International Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert denied*, 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976) (hereinafter *Lodges*). Prejudgment interest is to be awarded whenever damages lawfully due are withheld, unless there are exceptional circumstances to justify the refusal. *United States v. Motor Vessel Gopher State*, 614 F.2d 1186, 1190 (8th Cir.1980); *The Wright*, 109 F.2d 699, 702 (2d Cir. 1940).
>
> A vital ingredient in the determination of whether to award prejudgment interest is a desire to make whole the party injured, but in appropriate circumstances compensatory principles must be tempered by an assessment of the equities. *Lodges, supra*, 534 F.2d at 447. No finding was made by the district court that established the existence of exceptional or peculiar circumstances; the district court merely rejected appellant's claim because "the value which appellant placed upon the facility was unreasonably high." *Cargill, Inc. v. Taylor Towing Service, Inc., supra*, 483 F.Supp. at 1099. The district court did not make a specific finding of bad

> faith on the part of appellant; nor did the district court find that appellant was dilatory in bring the suit or that appellant asserted frivolous claims. *Mid-America Transportation Co. v. Cargo Carriers, Inc.*, 480 F.2d 1071, 1074 (8th Cir. 1973); *Mid-America Transportation Co. v. Rose Barge Line, Inc., supra*, 477 F.2d at 916. Thus, we are compelled to remand this issue to the district court with instructions to grant prejudgment interest on the amount of the damages awarded. [footnote omitted]

With regard to the appropriate interest rate to be applied, Petitioners suggest to this Court that the First Circuit's reference to state law, which in this case would result in a 12% interest rate under Nebraska law is, of course, one method of selecting the appropriate interest rate. However, it hardly seems appropriate for purposes of federal labor law that the interest rate to be allowed should depend upon the legislative enactments of the various States. Rather, Petitioners suggest that the interest rate utilized by the NLRB (and the method of computation) is the appropriate benchmark interest rate to be utilized. This would provide uniformity throughout the various Circuits with regard to interest due on backpay awards in §301 actions. The remedy then due any employee who is unable to convince the NLRB to accept an unfair labor practice charge and who seeks to vindicate personal rights through a §301 action will be a consistent remedy in any Federal Court in which the employee files a breach of contract claim.

CONCLUSION

The Petitioners respectfully request the Court order a summary disposition, on the merits, of this matter and direct the Eighth Circuit to remand this matter to the Trial Court with specific instructions that Petitioners' remedy

and damage claims be measured by the collective bargaining agreement in existence since their wrongful termination of employment; that attorney fees are properly awardable as part of Petitioners' compensatory damages; and, that interest is to be awarded on all backpay awards due the Petitioners in the same fashion as interest is awarded on backpay awards by the NLRB. Alternatively, Petitioners request that this Court grant this Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 91-3549NE, 91-3553NE, 92-1563NE, 92-1591NE

Selman Thomas, Jr., et al., Appellants, v. Bakery, Confectionery and Tobacco Workers International Union, Local #433; Metz Baking Company Appellees, Curtis Burton; et al., Intervenors/Appellees.	On Appeal from the United States District Court for the District of Nebraska. (Filed Dec. 31, 1992)

Caption intentionally shortened by Petitioners

Submitted: October 12, 1992

Filed: December 31, 1992

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN, Circuit Judge, and LARSON,* Senior District Judge.

RICHARD S. ARNOLD, Chief Judge.

* The Hon. Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

This is the end of a dispute which began in February of 1983 when the defendant, Metz Baking Company, purchased most of the assets of Interstate Brands Corporation (IBC). The purchase included the plant on Leavenworth Street in Omaha, Nebraska, where the plaintiffs, forty former employees of IBC, worked. The problem arose when Metz closed down its own Omaha bakery and transferred those employees to the Leavenworth plant. Metz then "end-tailed" the former IBC employees, which means it placed them at the bottom of the plantwide seniority list. Consequently, when Metz made labor adjustments to rectify the two-workforce, one-plant problem, it laid off the plaintiffs.

After an unsuccessful attempt at arbitration, the plaintiffs sued Metz and Local No. 433 of the Bakery, Confectionery, and Tobacco Workers Union – the union which represented all of the former employees of IBC and the employees of Metz.[1] The trial was bifurcated, with the idea that relief would be determined later if the jury found the defendants liable. The jury did find the defendants liable, but the District Court granted judgment n.o.v. for the defendants. On appeal, we reversed the judgment n.o.v. and remanded for a determination of appropriate relief. *Thomas v. Bakery Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S.

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[1] Plaintiffs sued the Union for violating its duty of fair representation and Metz for committing a breach of the collective-bargaining agreement. For a full discussion of the liability trial, see *Thomas v. Bakery Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988).

1062 (1988). After a two-month trial, the District Court[2] awarded each plaintiff the equivalent of three months' wages less any income actually earned during that period. The plaintiffs make numerous arguments on appeal. We reject all of them and affirm the judgment of the District Court.

I.

The District Court found the following passage from a footnote in our earlier opinion to be central to its resolution of damages:

> The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely a declaratory judgment and perhaps nominal damages.

Thomas, 826 F.2d at 760 n.1. Since Metz could not have kept all of the employees from both workforces, and the collective-bargaining agreement had no provision governing labor in the event of a corporate merger, the collective-bargaining agreement would have had to be modified. In footnote 1 we ordered the District Court to

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[2] The Hon. Lyle E. Strom, Chief United States District Judge for the District of Nebraska.

determine what that modification would have been if proper negotiations had in fact taken place.

The Court found that a modification would have legally end-tailed the former IBC employees. Thus, it held that Metz could have legally fired the plaintiffs as soon as the modification had been negotiated, proposed, and ratified, which, the Court found, would have been sometime in June. The plaintiffs were therefore entitled to recover for the loss they suffered during the three-month period from mid-March, when they were laid off, until mid-June, when they could have legally been laid off. *Thomas v. Bakery Workers Union Local #433*, No. CV83-0-652, slip op. at 10-12 (D. Neb. October 11, 1991).

II.

Plaintiffs first argue that the District Court erred in its application of footnote 1. They argue that the jury found that had negotiations taken place, the plaintiffs would never have been laid off, because any new agreement would have preserved their seniority rights. This, they add, is the law of the case, and this court did not direct the District Court to re-examine the jury's determination as to the probable result of negotiations. Footnote 1, they claim, merely directed the District Court to apportion damages between the Union and Metz. Having written this passage, we disagree. First, the language in the footnote is not simply referring to an apportionment-of-damages matter. We expressly directed the District Court to determine "who would have voted to ratify a negotiated solution" so it could ascertain what would have occurred – that is, what the solution would have

been – but for the failure to negotiate. Second, the plaintiffs have mischaracterized what the jury decided. Contrary to the plaintiffs' argument, the jury did not find that an agreement preserving the plaintiffs' jobs would have been reached, but that they would not have been laid off in *March* had the Union negotiated. Appellant's Add. 107-08. In fact, the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would have ended up with jobs after negotiations.

This brings us to plaintiffs' alternative argument, which is that the District Court erred in holding that the plaintiffs would have been end-tailed if negotiations had taken place. First, they argue, the only persons who would have been entitled to vote to modify the collective-bargaining agreement were the original employees at the Leavenworth plant, that is, the plaintiffs. Second, even if both Metz and IBC employees had voted, there was not enough evidence to support the District Court's determination. We disagree.

First, Metz purchased IBC and transferred its employees to the Leavenworth plant. The collective-bargaining agreement, which governed both workforces, could be modified only by a majority vote of the members affected. See *Thomas v. Bakery Workers Union Local No. 433*, No. CV83-0-652, slip op. at 9 (D. Neb. October 11, 1991). Both workforces were affected; both were entitled to vote. It is unfortunate for the plaintiffs that IBC was bought out by another corporation complete with its own workforce, but Metz's decision to keep open the former IBC plant rather than the Metz plant does not change the fact that Metz's actions and any resultant modification

would have had an impact on both workforces. Both would have voted.

We also reject the sufficiency-of-the-evidence claim. At the time of the merger, there were seventy-nine to ninety-two Metz employees and forty-one to sixty IBC employees who would have been entitled to vote on a modification. The defense presented seventy-nine affidavits of Metz employees stating that they would have voted to end-tail the plaintiffs. Only a majority vote would have been necessary to modify the agreement. The District Court's decision was amply supported by the evidence.

III.

The third claim raised by the plaintiffs is that the District Court erred in its handling of certain procedural matters: the Court should not have allowed the defendants to amend their answers to add the affirmative defense of mitigation of damages; and it should not have permitted intervention by the Metz employees. Plaintiffs claim that in February of 1985, at the first pre-trial conference, the trial judge said that since mitigation had not been pleaded, he was not going to allow either defendant to amend its pleadings to add this affirmative defense. The plaintiffs add that the undue delay, more than two years after the original filing of the defendants' answers, prejudiced them. The plaintiffs miss the mark on the undue-delay claim. The defendants filed these amendments immediately after we remanded the case for a determination of the appropriate remedy, before any pre-trial discovery. The plaintiffs had nearly two years to

conduct discovery on this issue. This is not undue delay. More importantly, no one except plaintiffs' counsel remembers an order permanently disallowing a mitigation-of-damages amendment. In fact, the judge, in response to a letter from the plaintiffs on the issue, said

> My usual procedure would have been to reduce rulings to writing if they were to be regarded as establishing the law of the case. Also, since we were deferring the issue of damages . . . I am uncertain as to why I would have made such a ruling at that point in time. . . .

Union's Brief 53. We therefore reject the plaintiffs' argument that the District Court erred in allowing the defendants to add the affirmative defense to their answers. We cannot enforce an alleged off-the-record order as to which recollections differ.

The plaintiffs next argue that the District Court abused its discretion in allowing seventy-nine Metz employees to intervene in this action. They claim that the intervenors' rights had already been determined in the liability trial, and anyway, it was too late to intervene. We reject the plaintiffs' arguments. The intervenors' rights were not determined in the liability trial. The Metz employees' seniority rights were not in issue. In any event, any rights the intervenors had were adequately protected by Metz in the liability phase of the trial, since Metz was defending its action in end-tailing the plaintiffs, an action the Metz employees approved of. The intervenors had a substantial interest in the remedy phase of the trial, however, since a decision to reinstate the plaintiffs, dove-tail them with the Metz employees, or end-tail the Metz employees would substantially affect

their rights. Moreover, Metz would not have protected their interests adequately, because it might have favored reinstatement of the plaintiffs to lessen its damages. The motion was timely since it was filed immediately after we remanded the case for the determination of relief, precisely the element of this action in which the intervenors had an interest.

IV.

The plaintiffs' next argument is that the District Court erred in denying attorneys' fees and prejudgment interest. With regard to attorneys' fees, the plaintiffs claim that we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees. The plaintiffs are straining a bit on this argument. The question of bad faith sufficient to justify an award of attorneys' fees was never before this Court. Assuming for the sake of argument that it was before us and that we found bad faith, whether or not to award attorneys' fees was still within the District Court's discretion, and we do not think that discretion was abused here.

With respect to the prejudgment interest, the plaintiffs argue that the District Court abused its discretion by denying it since, they claim, it is ordinarily granted absent bad faith, dilatoriness, or the assertion of frivolous claims on the part of the plaintiff. Plaintiffs have misstated the proper legal standard. Like attorneys' fees, an award of prejudgment interest is within the discretion of the trial judge; it is never automatic. We see no evidence here that the District Court abused its discretion.

V.

Finally, the plaintiffs argue that the District Court erred in computing damages by not including in its calculations overtime pay, vacation pay, pension contributions, earned work credit payments, health-insurance benefits, and life-insurance benefits. The plaintiffs did not, however, document any specific health or life-insurance benefits that should have been paid during the three-month period but were not. In fact, they did not request any specific amount at all. We have thoroughly searched the record for discrepancies, but have found nothing to cause us to believe the calculation by the District Court was clearly erroneous. In fact, the Court awarded most of the plaintiffs more than their own calculations for the second quarter of 1983 – including overtime pay, health and life-insurance benefits, and vacation pay – indicated was appropriate. Additionally, none of the plaintiffs claimed that medical expenses or life-insurance benefits were even owed for the months of March through June of 1983. The District Court was also correct not to include an amount for pension contributions. Metz makes a contribution in a good year only. A good year means that the employee worked at least 1800 hours that year. None of the plaintiffs would have accumulated 1800 hours by mid-June. In conclusion, we are not persuaded that the District Court's calculation of damages is clearly erroneous.

IV. (sic)

In light of our decision, it is unnecessary to address the arguments of the intervenors. Our affirmance on the

merits of the main appeal necessarily means that plaintiffs have no seniority rights superior to those of the intervening group of Metz employees.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, v. BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL #433, et al., Defendants.	CV. 83-0-652 MEMORADUM OPINION (Filed Oct. 11, 1991)

I. FINDINGS OF FACT

A. This matter is before the Court on remand from the Eighth Circuit Court of Appeals for determination of damages. Jurisdiction is premised upon Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185).

B. PARTIES

Plaintiffs are individuals and former employees of Interstate Brands Corporation (hereinafter "IBC") who were subsequently, for varying time periods, employees of Metz Baking Company (hereinafter "Metz"), an Iowa corporation which at all times hereto operated one or more bakery facilities in Nebraska. Defendant Bakery, Confectionery & Tobacco Workers Union Local 433 (hereinafter "Union") is a labor organization under the

National Labor Relations Act. "Intervenors" are current employees of Metz.

C. BACKGROUND

The rather tortured history of this matter involves two separate arbitration hearings, two trials involving three federal district court judges, an appeal to the United States Court of Appeals for the Eighth Circuit and a petition for writ of certiorari to the United States Supreme Court which was denied, *Metz v. Bakery, Confectionery & Tobacco Workers, Union Local* #433, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988). This eight-year saga began on February 19, 1983, when Metz purchased the Omaha assets of IBC pursuant to an agreement dated February 19, 1983. The two companies had been competitors in the Omaha area bread market, each with its own bakery, routes, and employees. Under the purchase agreement (Exhibit 74c, § 10), Metz became the successor employer of the IBC employees. IBC had forty-one (41) full-time employees at the time of the sale; Metz had seventy-eight (78) (Exhibit 74e at 2).

With its purchase of IBC, Metz found itself with two bakeries and two work forces in one market. Both sets of employees were represented by the Union, and both Metz and IBC had operated under a jointly executed collective bargaining agreement with the Union. That agreement made no express provision for merging separate work forces in the event of a corporate merger. Metz and the Union did not negotiate on this issue; any proposals resulting from such negotiation would have required modification of the collective bargaining agreement and

would have been subject to ratification by Union members in the two facilities.

Metz initially kept all employees of both plants on its payroll, although it "end-tailed" the former IBC employees, treating them as "new hires," with a seniority date of February 19, 1983.[1] Metz' intent at the time of purchase had been to operate both bakeries for a period of at least six to eight (6 to 8) weeks in order to retain as much of the former IBC business as possible. However, the transition went more quickly than anticipated, and in two weeks, Metz consolidated operations in one plant. Because it considered the former IBC bakery – the "Leavenworth" facility – more modern and efficient, Metz decided to keep that one open and to close its own former bakery – the "Nicholas" facility. In early March, 1983, Metz moved its own employees into the Leavenworth facility and began laying of the former IBC employees (hereinafter "plaintiffs").

On or about March 4, 1983, plaintiffs filed a grievance (Exhibit 74h) in which they alleged that the seniority provisions of their contract were unfairly and improperly implemented by Metz. They sought to have their jobs restored in accordance with their seniority and to be awarded backpay. The Union, contending that it had a duty to represent both groups, opted to stay neutral with regard to the grievance. Arbitration was held on April 26, 1983, and on June 7, 1983, Arbitrator James A. Doyle

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[1] The evidence is clear that if Metz had chosen to "dovetail" the two sets of employees, *e.g.* to merge the seniority lists on the basis of time with either employer, the result would have been disproportionately in favor of the former IBC employees.

entered his decision in favor of Metz and against the former IBC employees (Exhibit 74e, hereinafter designated as "Doyle No. 1").[2] On September 9, 1983, plaintiffs filed the suit that is the nucleus of the present case, alleging that the Union had violated its duty of fair representation with respect to both negotiation and the arbitration, and alleging that Metz had violated the terms of the collective bargaining agreement covering the IBC workers.

While that suit was pending, plaintiffs filed a second grievance on October 6, 1983, dealing solely with the issue of their right to severance pay. On December 15, 1983, Arbitrator Doyle entered a decision awarding severance pay to thirty-seven (37) of the plaintiffs (Exhibit 301, hereinafter "Doyle No. 2"). When Metz demanded that the successful grievants sign a "Release and Receipt" before they could receive their severance pay, those grievants filed suit in federal court (CV. 83-O-560). On May 16, 1985, a hearing was held before Senior Judge Richard E. Robinson. From the transcript of that hearing (Exhibit 103c) and Judge Robinson's opinion (Exhibit 103d), it is clear all parties and the Court agreed that the sole purpose of the receipt was to acknowledge payment for whatever sums these plaintiffs were entitled to receive under the collective bargaining agreement between IBC and the Union, and that signing the receipt would have no effect on future rights of the signers with regard to the

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[2] Because that arbitration decision was ultimately held by the jury to be invalid due to the Union's breach of its duty of fair representation, that decision is not binding on the parties to this dispute.

pending companion case (ultimately the case now before this Court).

In the meantime, plaintiffs' suit with regard to Doyle No. 1 came to trial before The Honorable C. Arlen Beam in a bifurcated jury trial. On July 16, 1986, the jury returned a verdict in favor of plaintiffs on the liability phase of the trial (Filing No. 49, Exhibit No. 72). On August 13, 1985, Judge Beam granted motions for judgment notwithstanding the verdict in favor of both the Union and Metz (Filing No. 77). The plaintiffs filed a timely appeal and on August 17, 1987, the Eighth Circuit Court of Appeals reversed, and remanded for determination of appropriate remedies. *Thomas v. Bakery, Confectionery, and Tobacco Workers Union Local 433*, 826 F.2d 755 (8th Cir. 1987).

On March 7, 1988, the United States Supreme Court denied Writs of Certiorari on behalf of both Metz and the Union. On November 8, 1988, several Metz employees were permitted to intervene in the case, "tak[ing] the case as they find it as of the date of this order" (Filing No. 117). Trial was begun before The Honorable William G. Cambridge on October 16, 1990, but was continued when Judge Cambridge recused himself, and the case was reassigned to this Court. The instant trial began on April 29, 1991, and concluded on June 20, 1991, when the parties presented their closing arguments.

II. CONCLUSIONS OF LAW

A. THE FRAMEWORK FOR ANALYSIS

The legal analysis by this Court is of necessity framed by the jury findings in the previous trial and by the Eighth Circuit Court of Appeals instructions on remand.

As noted above, the trial jury in the first phase of a bifurcated trial found for the plaintiffs against both defendants. Specifically, the jury found, by special verdict: (1) that the Union had breached its duty of fair representation to the plaintiffs (Exhibit No. 72, Questions 1 and 3); (2) that the Union's failure to negotiate had resulted in the plaintiffs being laid off in March of 1983 (Exhibit No. 72, Question 2); (3) that the Union's conduct had tainted the arbitration proceeding (Exhibit No. 72, Question 4); (4) that Metz had assumed and subsequently breached contractual seniority obligations to the plaintiffs (Exhibit No. 72, Questions 5, 6, and 7); and (5) that the plaintiffs were laid off as a result of Metz' breach of that agreement (Exhibit No. 72, Question 8).

Those jury findings were set aside by Judge C. Arlen Beam, who entered judgment notwithstanding the verdict. Specifically, Judge Beam held that (1) because the jury found that Metz had agreed to assume plaintiffs' IBC seniority rights, the Union had no duty of fair representation other than to facilitate the arbitration proceeding that was in fact held; (2) that the Union had no knowledge of the impending layoffs before they began, and hence no duty to represent the plaintiffs before that time; and (3) that negotiation was ultimately unnecessary, because the

Metz employees, who significantly outnumbered the former IBC employees, would necessarily have voted in favor or their own economic self-interest in ratifying any negotiated solution (Filing No. 79).

The Eighth Circuit Court of Appeals subsequently reinstated the jury's finding of liability and remanded for determination of appropriate remedies. The Court of Appeals first found that sufficient evidence had been adduced to support the jury's findings that the Union had known prior to the layoffs of a threat to plaintiffs' seniority rights under the terms of the IBC-Metz purchase agreement and had nonetheless failed to represent the plaintiffs. *Thomas,* 826 F.2d at 759.

The Court of Appeals next rejected the District Court's conclusion that negotiations would necessarily have been futile and that the failure to negotiate therefore could not support an allegation of a breach of the duty of fair representation. The appellate court first reasoned that the futility argument goes to the issue of remedy, not breach of duty. *Id.* at 759-60. Then, in a footnote that this Court finds is central to the resolution of this matter, the Eighth Circuit directed that

> [t]he District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that *would have been feasible,* and this will help the Court to determine *what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof,* and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely

> a declaratory judgment and perhaps nominal damages.

Id. at 760, n.1 (emphasis added). In other words, in determining the appropriate remedy, plaintiffs bear the burden of proving what loss, if any, they would have suffered even if the Union and Metz had properly handled the merger of the work forces.

B. APPLYING FOOTNOTE 1

"Negotiating seniority provisions is a duty uniquely within the province of the bargaining agent. The Union is free to renegotiate seniority provisions [subject only] to its obligation to treat all members fairly." *Papcin v. Dichello Distributors, Inc.*, 697 F.Supp. 73, 80 (D.Conn. 1988), *aff'd*, 862 F.2d 304 (2d Cir. 1988). *See also King v. Space Carriers, Inc.*, 608 F.2d 283 (8th Cir. 1979) (upholding Union's right to negotiate dovetailing agreement). It would have been possible for Metz and the Union to have negotiated a solution to the post-merger seniority problem and proposed it to the Union membership for ratification. If the collective bargaining agreement had been modified, then there could not have been a grievance based on breach of contract and, therefore, no need for arbitration.

Accordingly, the task facing this Court is to determine, to the extent possible, how the seniority rights of all post-merger Metz employees, including those of the former IBC employees, would have been modified had the Union and Metz negotiated the merger. Such negotiated changes would have to be ratified by a majority vote of the eligible membership (Exhibit 65, "By-Laws of Local

433," Article XI, § 1). The burden was on the plaintiffs to show that such contractual changes would not have been ratified, and it is clear from the evidence presented at trial that they could not and did not carry that burden.

While one collective bargaining agreement had been negotiated between the Union and Metz, IBC and ITT Continental Baking Company, Inc. (Exhibit 302), the Court of Appeals held that while "there was only one written contract, the words of that contract represented *separate labor agreements* running between each employer and the *individual bargaining units* of that employer's workers." 826 F.2d at 757 (emphasis added). The Collective bargaining Agreement (Exhibit 302) contains no provisions regarding procedures to amend or modify its terms. While Article XI of the By-Laws of Local # 433 (Exhibit 65) doesn't speak to amendment of existing agreements, it seems clear to the Court that any amendments to the seniority provisions of Exhibit 302 would result effectively in a new agreement and would require submission to the numbers for their approval or ratification. Article XI, Section 2 states: "All basic agreements covering wages, hours, and working conditions will be *subject to the approval of a majority of the members covered by such agreement.*" (Emphasis added). Clearly the membership entitled to vote would be the employees of Metz and IBC only as it was their respective contracts which would be modified.

Although the exact numbers are in dispute, it is undisputed that, at the time of the merger of the two work forces in early March, the number of Metz employees eligible to vote significantly outnumbered the

number of former IBC employees who could have voted.[3] By stipulation, Metz introduced seventy-nine (79) affidavits from the Metz employees (Exhibit 101), supported by trial testimony, in which each stated unequivocally that he or she would have voted to end-tail the former IBC employees. Had such a proposal been presented for ratification, it is clear that the collective bargaining agreement would have been modified, and the former IBC employees would have been legally end-tailed. In such a situation, arbitration would not have been required, and no breach of contract or of a duty of fair representation could have occurred. Damages to which plaintiffs are entitled, if any, are therefore limited to the time period before which they could have been legally laid off. *Cf. Westland v. Sero of New Haven*, 601 F.Supp. 163, 167 (N.D. Ill. 1985) (plaintiff's damages for lost commissions "stop at the date he *could* have been rightfully terminated") (emphasis in original).

C. THE REMEDY

Although plaintiffs cannot prove they would have suffered any loss after the collective bargaining agreement would have been modified and, therefore, are not entitled to any remedy after that date, the jury specifically found that they would not have lost their full-time positions had Metz and the Union complied with the collective bargaining agreement as it existed at the time of the layoffs. The necessary conclusion, therefore, is that

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[3] Estimates of eligible continuing Metz employees range from eighty-nine to ninety-two (89 to 92) and of former IBC employees from forty-nine to sixty (49 to 60).

plaintiffs would have had their jobs until the collective bargaining agreement was modified and were wrongfully denied the income they would have earned under the existing agreement.

Accordingly, plaintiffs are entitled to recover for the loss they suffered during the time it would have taken to negotiate and ratify the necessary changes in the collective bargaining agreement. Under the then-applicable by-laws of the Union, any change to a basic agreement must be considered "at a regular meeting or at a special meeting called for this purpose." (Exhibit 65, Article XI, § 1). No specific time frame is set out, but the evidence suggests that it would have taken approximately three months to negotiate, propose and ratify the modification to the collective bargaining agreement. Accordingly, the Court finds each plaintiff will be entitled to recover the income she or he would have earned from Metz during such period, reduced by the income earned, if any, from employment at Metz or elsewhere during that same time period.

The severance pay received by thirty-seven (37) of the plaintiffs pursuant to the Doyle No. 2 arbitration and award will not serve to reduce recovery by any plaintiff. Those funds were payment for past services to IBC. *See* 51 C.J.S. *Labor Relations* § 254 (1967): "Severance pay in a collective bargaining agreement is terminal compensation measured by the service given during the subsistence of the contract." Those funds therefore do not constitute a set-off for any breach by Metz of the contractual obligation it assumed when it purchased the assets of IBC.

The seniority grievance was delivered to the Union on or about March 4, 1983 (Exhibit 74h) and was forwarded to the Company by the Union's attorney on or about March 7, 1983. The modification of the collective bargaining agreement would have then been concluded some time in June of 1983. Balancing the interests of the parties and finding that the plaintiffs have sustained damage, it is now the duty of the Court to ascertain on behalf of each plaintiff the amount of that damage. The parties at the commencement of the trial, and pursuant to the urging of the Court, tried to work out the terms of a stipulation to deal with the income which each plaintiff would have received, together with the amount of earnings they realized from other sources during the period after March 21, 1983, when nearly all of them had been laid off. The plaintiffs calculated these amounts on a quarterly basis. The defendants have stipulated that the figures used by the plaintiffs are correct and that the amounts which would have been realized on a quarterly basis as set forth in the stipulation are correct but have taken issue with that as being an appropriate way of approaching the calculation of damages. Balancing the interests of the parties, the Court finds that damages should be awarded through June 15, 1983. Accordingly, the Court finds that the plaintiffs separately have sustained damages in the loss of income. The income loss would be the contract wages due from Metz for the period through June 15, 1983, plus holiday pay, less interim earnings. These amounts for each plaintiff are as follows:

1983: 1st and 2nd Quarters

Lloyd Anderson:	Contract plus Holiday	$4,738.72
	Interim	3,789.41
	Lost Income	949.31
David Bell:	Contract plus Holiday	4,786.24
	Interim	4,516.74
	Lost Income	269.50
Dale Burk:	Contract plus Holiday	4,786.24
	Interim	3,782.70
	Lost Income	1,003.54
Dennis Canterbury:	Contract plus Holiday	5,596.00
	Interim	282.04
	Lost Income	5,313.96
Gerald Carew:	Contract plus Holiday	5,596.00
	Interim	178.72
	Lost Income	5,417.28
John Conner:	Contract plus Holiday	5,310.24
	Interim	3,513.80
	Lost Income	1,796.44
Curtis Cotton:	Contract plus Holiday	4,744.00
	Interim	3,301.15
	Lost Income	1,442.85
Michael DeJanes: (sic)	Contract plus Holiday	5,444.00
	Interim	3,174.67
	Lost Income	2,269.33
Ressie Estell:	Contract plus Holiday	5,310.24
	Interim	210.59
	Lost Income	5,099.65
Robert Fillbach:	Contract plus Holiday	4,627.84
	Interim	1,625.57
	Lost Income	3,002.27

Paul Flower:	Contract plus Holiday	4,786.24
	Interim	3,857.83
	Lost Income	928.41
David Foster:	Contract plus Holiday	5,310.24
	Interim	138.07
	Lost Income	5,172.17
Donald Froien:	Contract plus Holiday	5,492.64
	Interim	- 0 -
	Lost Income	5,492.64
James George:	Contract plus Holiday	5,444.00
	Interim	528.60
	Lost Income	4,915.40
Eddie Gill:	Contract plus Holiday	5,310.24
	Interim	426.75
	Lost Income	4,883.49
Thomas Hayden:	Contract plus Holiday	5,383.20
	Interim	3,136.43
	Lost Income	2,246.77
Ivan Heesacker:	Contract plus Holiday	5,310.24
	Interim	2,903.96
	Lost Income	2,406.28
Robert Hinsley:	Contract plus Holiday	4,738.72
	Interim	3,468.97
	Lost Income	1,269.75
Lewis Huston:	Contract plus Holiday	4,786.24
	Interim	4,425.35
	Lost Income	360.89
Josephine James:	Contract plus Holiday	5,310.24
	Interim	3,666.07
	Lost Income	1,644.17
Calvin Jewett:	Contract plus Holiday	5,444.00
	Interim	3,537.70
	Lost Income	1,906.30

Ralph Johnson:	Contract plus Holiday	4,786.24
	Interim	3,410.33
	Lost Income	1,375.91
Kent Jorgensen:	Contract plus Holiday	5,379.04
	Interim	2,766.52
	Lost Income	2,612.52
Patricia Livengood:	Contract plus Holiday	5,310.24
	Interim	1,843.52
	Lost Income	3,466.72
William Marsh:	Contract plus Holiday	5,596.00
	Interim	655.00
	Lost Income	4,941.00
Clyde Moore:	Contract plus Holiday	4,627.84
	Interim	4,225.69
	Lost Income	402.15
Percy Moore:	Contract plus Holiday	4,738.72
	Interim	4,222.21
	Lost Income	516.51
James Nash:	Contract plus Holiday	4,627.84
	Interim	3,504.24
	Lost Income	1,123.60
Robert Peters:	Contract plus Holiday	4,691.20
	Interim	3,295.81
	Lost Income	1,395.39
John Pittman:	Contract plus Holiday	5,437.92
	Interim	2,430.57
	Lost Income	3,007.35
Sylvio Rebolloso:	Contract plus Holiday	4,691.20
	Interim	3,589.97
	Lost Income	1,101.23

Jane Reed:	Contract plus Holiday	5,437.92
	Interim	4,504.18
	Lost Income	933.74
Wayne Shaffar:	Contract plus Holiday	5,492.64
	Interim	489.03
	Lost Income	5,003.61
Paul Stone:	Contract plus Holiday	5,437.92
	Interim	3,391.33
	Lost Income	2,046.59
Selman (Joe) Thomas, Jr.:	Contract plus Holiday	5,310.24
	Interim	3,846.04
	Lost Income	1,464.20
James Thompson:	Contract plus Holiday	4,738.72
	Interim	4,224.06
	Lost Income	514.66
Melvin Wade, Jr.:	Contract plus Holiday	5,492.64
	Interim	1,446.53
	Lost Income	4,046.11
James Walker:	Contract plus Holiday	5,310.24
	Interim	114.16
	Lost Income	5,196.08
Clayton Welch:	Contract plus Holiday	4,738.72
	Interim	3,093.73
	Lost Income	1,644.99
Ishanwee Wrenn:	Contract plus Holiday	5,310.24
	Interim	164.43
	Lost Income	5,145.81

D. THE COURT SHOULD CONSIDER THE UNION'S ABILITY TO PAY.

The Union argues that public labor policy precludes imposition of damages on it that would impair its ability to represent its members and that its financial condition is therefore a relevant consideration. However, the cases upon which the Union relies, *e.g., Bowen v. United States Postal Service*, 459 U.S. 228 (1983), and *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), are inapposite in that both are concerned with the impact of *punitive* damages, which are not a factor in the instant case. *See Foust*, 442 U.S. at 50-52:

> This limitation on union liability [for breach of the duty of fair representation] reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds. To permit *punitive* damages, which, by definition, provide monetary relief in excess of actual loss, could undermine this careful accommodation [since] the impact of these windfall recoveries is unpredictable and potentially substantial. . . . Because general labor policy disfavors punishment, and the adverse consequences of *punitive damages awards* could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation.

(Citation omitted, emphasis added). *See Bowen*, 459 U.S. at 228 n.16 n.16 (upholding an award of compensatory

damages against the union and reiterating the *Foust* proscription against *punitive* damages). The financial condition of defendant Union is therefore not relevant to this Court's determination of damages.

E. LIABILITY IS JOINT AND SEVERAL

Although damages are ordinarily apportioned in § 301 cases, *see, e.g., Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967), that policy is premised upon independent breaches by each party. *See Vaca*, 386 U.S. at 197 n.1 ("Since the union played no part in [employer]'s alleged breach of contract and since [employer] took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted"); *see also Bowen*, 459 U.S. at 223 n. 11 (1983) (In discussing the usual allocation of damages in section 301 actions, the Court noted that "this is not a situation in which either the union or employer has participated in the other's breach").

By contrast, the instant case is one in which both defendants bear equal responsibility. The jury expressly found that Metz and the Union caused plaintiffs to be wrongfully laid off, the Union by failing to negotiate the merger and Metz by breaching the contractual obligations it had assumed. Accordingly, "this case presents the unusual situation in which an employer has participated in the union's breach of duty, [and] joint and several liability is warranted." *Allen v. Allied Plant Maintenance Company*, 881 F.2d 291, 299 (6th Cir. 1989).

F. ATTORNEYS' FEES

Under the "American Rule," a prevailing party may recover attorneys' fees only when authorized by statute, except in certain recognized and limited exceptions. *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240 (1975). Title 29, U.S.C. § 185 does not authorize such an award, *Actors Equity Association v. American Dinner Theatre Institute*, 802 F.2d 1038, 1043 (8th Cir. 1986), and an award of fees in a case brought pursuant to it may be made "only where the losing party clearly acted in bad faith." *Id.* at 1042. The Court further stated: "In this Court's view, bad faith would be evidenced in the present case by a showing that the appellants intentionally advanced a frivolous contention for an ulterior purpose, such as harassment or delay." *Id.* at 1043.

A finding of bad faith is a factual determination for the trial court, *id.*, and is generally warranted only if losing party's claim was "frivolous, unreasonable, or groundless, or where the party continued to litigate after it clearly became so." *Id.; Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). There is no evidence of such conduct by defendants in the instant case.

Plaintiffs argue that they should be allowed to recover the attorney fees as an element of damages, not as fees per se. Although other circuits have allowed such recovery, *see e.g. Scott v. Local Union 377, International Brotherhood of Teamsters, etc.*, 548 F.2d 1244, 1246 (6th Cir. 1977), the Eighth Circuit has expressly held that attorneys' fees may not be considered as compensatory damages. *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978) ("Attorney's fees incurred in bringing a § 301

action do not rise to the status of compensatory damages"). Attorneys' fees will not be awarded. An order in accordance with this opinion will be entered this date.

DATED this 11th day of October, 1991.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, v. BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL # 433, et al., Defendants.	CV. 83-0-652 ORDER AND JUDGMENT (Filed Oct. 11, 1991)

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Judgment is entered in favor of plaintiffs and against defendants, jointly and severally, in the total amount of $103,728.57, together with taxable costs, and plaintiffs shall recover as follows:

Lloyd Anderson:	$ 949.31
David Bell:	269.50
Dale Burk:	1,003.54
Dennis Canterbury:	5,313.96
Gerald Carew:	5,417.28
John Conner:	1,796.44
Curtis Cotton:	1,442.85
Michael DeJanes: (sic)	2,269.33
Ressie Estell:	5,099.65
Robert Fillbach:	3,002.27
Paul Flower:	928.41

David Foster:	5,172.17
Donald Froien:	5,492.64
James George:	4,915.40
Eddie Gill:	4,883.49
Thomas Hayden:	2,246.77
Ivan Heesacker:	2,406.28
Robert Hinsley:	1,269.75
Lewis Huston:	360.89
Josephine James:	1,644.17
Calvin Jewett:	1,906.30
Ralph Johnson:	1,375.91
Kent Jorgensen:	2,612.52
Patricia Livengood:	3,466.72
William Marsh:	4,941.00
Clyde Moore:	402.15
Percy Moore:	516.51
James Nash:	1,123.60
Robert Peters:	1,395.39
John Pittman:	3,007.35
Sylvio Rebolloso:	1,101.23
Jane Reed:	933.74
Wayne Shaffar:	5,003.61
Paul Stone:	2,046.59
Selman (Joe) Thomas, Jr.:	1,464.20
James Thompson:	514.66
Melvin Wade, Jr.:	4,046.11
James Walker:	5,196.08
Clayton Welch:	1,644.99
Ishanwee Wrenn:	5,145.81

2) Plaintiffs' application for attorney fees (Filing No. 527) is denied. No prejudgment interest is awarded.

DATED this 11th day of October, 1991.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, v. BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL # 433, et al., Defendants.	CV. 83-0-652 ORDER AND JUDGMENT (Filed Feb. 24, 1992)

Pursuant to the order of remand from the United States Court of Appeals for the Eighth Circuit, the Court scheduled a hearing for January 29, 1992. The parties advised the Court that no further evidence nor arguments would be presented to the Court. Accordingly, pursuant to the memorandum opinion entered herein,

IT IS ORDERED:

1) Judgment is entered in favor of plaintiffs and against defendants, Bakery, Confectionery and Tobacco Workers Union, Local #433, and Metz Baking Company, jointly and severally, in the total amount of $103,728.57, together with taxable costs, and plaintiffs shall recover as follows:

Lloyd Anderson:	$ 949.31
David Bell:	269.50
Dale Burk:	1,003.54
Dennis Canterbury:	5,313.96

Gerald Carew:	5,417.28
John Conner:	1,796.44
Curtis Cotton:	1,442.85
Michael DeJanes: (sic)	2,269.33
Ressie Estell:	5,099.65
Robert Fillbach:	3,002.27
Paul Flower:	928.41
David Foster:	5,172.17
Donald Froien:	5,492.64
James George:	4,915.40
Eddie Gill:	4,883.49
Thomas Hayden:	2,246.77
Ivan Heesacker:	2,406.28
Robert Hinsley:	1,269.75
Lewis Huston:	360.89
Josephine James:	1,644.17
Calvin Jewett:	1,906.30
Ralph Johnson:	1,375.91
Kent Jorgensen:	2,612.52
Patricia Livengood:	3,466.72
William Marsh:	4,941.00
Clyde Moore:	402.15
Percy Moore:	516.51
James Nash:	1,123.60
Robert Peters:	1,395.39
John Pittman:	3,007.35
Sylvio Rebolloso:	1,101.23
Jane Reed:	933.74
Wayne Shaffar:	5,003.61
Paul Stone:	2,046.59
Selman (Joe) Thomas, Jr.:	1,464.20
James Thompson:	514.66
Melvin Wade, Jr.:	4,046.11
James Walker:	5,196.08
Clayton Welch:	1,644.99
Ishanwee Wrenn:	5,145.81

2) Plaintiffs's (sic) application for attorney fees (Filing No. 527) is denied. No prejudgment interest is awarded.

3) Intervenors are dismissed as parties to this action.

DATED this 24th day of February, 1992.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

APPENDIX E

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-2214

Selman (Joe) Thomas, Jr.; Lloyd Anderson; David Bell; Dale John Burk; Dennis Canterbury; John Conner; Curtis Cotton; Michael DeJaynes; Bessie (sic) Estell; Mary Louis Fillbach (sic); Paul Flower; David Foster; Donald Froien; James George; Eddie Gill; Ivan Heesacker; Robert Hinsley; Lewis Huston; Josephine James; Calvin Jewett; Ralph Johnson; Kent Jorgensen; Patricia Livengood, William Marsh; Clyde Moore; Percy Moore; James Nash; Robert Peters; John Pittman; Sylvio Rebolloso; Jane Reed; Wayne Shaffar; Paul Stone; James Thompson; James Walker; Clayton Welch; Ishanwee Wrenn; Gerald Carew; Thomas Hayden; and Melvin Wade, Jr., Appellants, v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company, Appellees.	On Appeal from the United States District Court for the District of Nebraska.

Submitted: May 15, 1987
Filed: August 17, 1987

Before ARNOLD, Circuit Judge, WRIGHT* and HENLEY, Senior Circuit Judges.

ARNOLD, Circuit Judge.

In this action, plaintiffs are former employees of Interstate Brands Corporation ("IBC"), a bakery. In February 1983, defendant Metz Baking Company, a competitor of IBC, bought most of IBC's assets, including the plant on Leavenworth Street in Omaha, Nebraska, where plaintiffs worked. After the sale, Metz employed plaintiffs at the Leavenworth bakery for two weeks, until it closed down the other bakery it operated in Omaha, on Nicholas Street, and transferred the Nicholas Street employees (who were represented by the same union that represented the former IBC employees, defendant Local No. 433 of the Bakery, Confectionery, and Tobacco Workers Union) to the Leavenworth plant. Metz then "end-tailed" the former IBC employees, which means it placed them at the bottom of the plant-wide seniority list, after most of the Nicholas Street employees, for purposes of lay-offs. Of course, since Metz had two full complements of employees assigned to the Leavenworth plant after the transfers, lay-offs were immediately necessary, and the plaintiffs were laid off.

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* The Hon. Eugene A. Wright, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

After unsuccessfully taking their lay-offs to arbitration, plaintiffs sued the Union for violating its duty of fair representation and Metz for breaking the collective-bargaining agreement it had with plaintiffs. The trial was bifurcated. The question of liability was first submitted to the jury on special interrogatories, with the idea that relief would be determined at a later stage of the case if the jury should find defendants liable. The jury did find in favor of plaintiffs, but the District Court granted judgment n.o.v. for defendants and, in the alternative, denied defendants' motion for a new trial. Plaintiffs appeal the judgment n.o.v., and defendants claim error in the denial of their alternative motion for a new trial. We hold that the District Court erred in granting judgment n.o.v. but was correct in denying the new trial; therefore we direct that judgment be entered on the jury's verdict, and remand for determination of appropriate remedies.

I.

The Union represented both groups of employees involved here, as well as other bakery workers, and it had negotiated a single collective-bargaining agreement, on behalf of all its members, with IBC, Metz, and another baking company. But although there was only one written contract, the words of that contract represented separate labor agreements running between each employer and the individual bargaining units of that employer's workers. And each separate plant comprised an independent bargaining unit. Thus, before Metz bought IBC's assets, there was one agreement governing labor relations between IBC and its Leavenworth employees, and

another between Metz and its Nicholas employees, and the terms of the two agreements were identical.

The labor agreement, in effect from May 2, 1982, until May 5, 1985, provided in part:

> ARTICLE X
>
> SENIORITY
>
> * * * *
>
> Section 4. In the event it becomes necessary to reduce the working force for the lack of business or other legitimate reasons, the last person hired in the plant shall be the first person laid off. . . .

P. Ex. 2, at 3-4. The agreement also stated: "This Agreement and the provisions herein contained shall be binding upon the parties hereto, their heirs, successors or assigns." *Id.* at 18.

In February 1983, when Metz agreed to buy IBC's assets, Metz and IBC recorded their agreement in a lengthy purchase contract. Among the assets that IBC agreed to transfer to Metz were:

> [Section 1.1] (c) All of the rights of [IBC] in, to and under the contracts and commitments described in Exhibit D hereto; provided, however, that such contracts and commitments shall be assigned to [Metz] subject to all of the terms thereof. . . .

P. Ex. 1, at 2. Exhibit D to the purchase agreement described the collective-bargaining agreement between IBC and its Leavenworth employees. In turn, Metz agreed to

> [Section 3.1] (c) the assumption by [Metz] of the liabilities and obligations of [IBC] under the realty leases, contracts and commitments referred to in Sections 1.1 (b) and (c) hereof.

Id. at 5. Metz and IBC also agreed that payment of the purchase price would be made in part

> [Section 3.2] (b) by the delivery to [IBC] of a written undertaking . . . whereby [Metz] agrees to assume, pay, perform, satisfy and discharge the unfulfilled portion . . . of any and all duties, obligations and liabilities of [IBC] under the realty leases, contracts and commitments identified in Exhibits C and D hereto[.]

Ibid.

In addition to these provisions regarding the rights and duties that Metz would assume from IBC, the purchase agreement also provided for the "transfer" of employees from IBC to Metz.

> Section 10. Transferred Employees.
>
> 10.1 All of Seller's employees who are primarily engaged in the conduct of the Subject Operations as the Transfer Date shall become employees of Buyer on the Transfer Date (the "Transferred Employees"), and Buyer shall become the successor employer under, and shall use its best efforts to obtain novations with respect to, each of the collective bargaining agreements identified in Exhibit D hereto. Seller agrees to make full and final settlement with the Transferred Employees, as of the Transfer Date, with respect to wages, salaries, union dues, contributions to welfare and employee benefit plans, payroll taxes, premium pay and all other obligations relating to their employment by

> Seller, to and including the Transfer Date, except for the accrued vacation rights, if any, of the Transferred Employees, which rights Buyer agrees to recognize and honor subsequent to the Transfer Date, and except for contingent work week credits not yet due and payable.
>
> * * * *
>
> 10.3 Notwithstanding the foregoing, in the event that any claim is made against Seller, by reason of Seller having been a party to any of the collective bargaining agreements identified in Exhibit D hereto, or for severance or termination pay under or pursuant to any of said agreements by reason of the transfer of any employees to Buyer, the termination of any of the Transferred Employees by Buyer or the termination of any employees by Seller at the request of Buyer, Buyer shall indemnify and save Seller harmless from and against all such claims, including all costs and expenses of defending against any such claims and any and all liabilities arising therefrom. Nothing contained herein shall be deemed or construed to require Buyer to continue to employ any of the Transferred Employees during any period following the Transfer Date.

Id. at 13-14.

When Metz closed the purchase on February 19, 1983, it took on the former IBC employees and treated them as "new hires" as of that date, which destroyed their previous seniority with IBC and made them junior to all of Metz's Nicholas Street employees who had been hired before then. Plaintiffs' claim against Metz rests on the effect of the purchase agreement: If Metz agreed to

assume IBC's duties under the IBC-Leavenworth Street labor contract, then Metz was obliged to recognize the seniority plaintiffs had with IBC, and Metz could not treat them as new hires in February 1983, nor end-tail them to the Nicholas Street workers.

But plaintiffs have already presented this claim in arbitration, and the arbitrator ruled against them. This presents an obstacle to review of plaintiffs' claim in federal court, for plaintiffs are party to a labor contract with Metz (Metz agrees that it assumed IBC's labor agreement with the Leavenworth workers, but argues that this assumption did not include the seniority rights of the former IBC workers), and the labor contract states that claims such as plaintiffs' will be arbitrated, and that the arbitrator's decision will be binding on all the parties. In these circumstances, Metz is entitled to rely on the arbitrator's award as a bar to subsequent litigation of the claim unless the plaintiffs prove that the arbitration "process has fundamentally malfunctioned by reason of the bad-faith performance of the union," *Hines v. Anchor Motor Freight*, 424 U.S. 554, 569 (1976), in which case plaintiffs can avoid the bar. This requires that plaintiffs show that the Union violated its duty of fair representation and that this breach tainted or "seriously undermine[d] the integrity of the arbitral process." *Id.* at 567.

Therefore the immediate focus in this case is to determine whether there was a breach of the duty of fair representation; if not, then the entire case is over, because the Union has no liability and the arbitrator's award must stand. If the duty was violated, then it must be determined whether the breach tainted the arbitration; if not, Metz must win because it will be entitled to rely on the

arbitrator's decision. This was the approach taken by the District Court in its conscientious consideration of the motion for judgment n.o.v., and it ruled that the evidence was insufficient as a matter of law to establish either that the Union violated its fair-representation duty or that any such breach tainted the arbitration, and, accordingly, entered judgment n.o.v. for both defendants without reaching plaintiffs' claim against Metz. To those rulings we now turn.

II.

Plaintiffs alleged that the Union violated the duty of fair representation in two respects: first, by not negotiating with Metz to protect their seniority rights at the time of the sale, and second, by not representing their interests fairly at the arbitration. To establish a violation of the statutory duty of fair representation, plaintiffs must show that the Union was hostile, discriminatory, perfunctory, arbitrary, or dishonest, or acted in bad faith in representing their interests. See *Vaca v. Sipes*, 386 U.S. 171, 188-95 (1967). To hold the Union liable for damages on proof that it was any less culpable would infringe on the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents . . . " *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

A.

On their first theory, plaintiffs produced the testimony of Marlin Lessmann, Metz's general counsel, that he told Bernard Clausen, the president of Local 433,

within one or two days of the purchase that Metz considered plaintiffs to be newly hired as of February 19, 1983. Tr. I:75-76. Clausen denied this. Both testified that Lessmann informed the Union that Metz intended to operate the Leavenworth plant and the Nicholas plant in tandem for a time after the purchase, and Lessmann stated that he told Clausen that there probably would be a consolidation in the near future. Tr. I:91. One plaintiff, James Walker, testified that near the end of February he asked Clausen what was going on in relation to the sale of the Leavenworth plant, and "[Clausen] said we should have – we had our jobs, 'Don't worry,' we had our jobs." Tr. I:181.

Construing this evidence and all reasonable inferences from it in favor of plaintiffs, as we must, the jury could have credited Lessmann's and Walker's testimony and found that Clausen knew that Metz considered plaintiffs to be new hires, and that it contemplated consolidating the two plants, but told one of plaintiffs not to worry about his job. The jury could have inferred from this that Clausen knew that plaintiffs' jobs were at risk, refused to negotiate to protect their interests, and then lied to one of them about their precarious situation. This is sufficient to establish a violation of the fair-representation duty.

The District Court noted this evidence, but held that other evidence and factors made the jury finding unsupportable. First, it found this finding inconsistent with the jury's additional finding that Metz agreed to assume plaintiffs' seniority rights from IBC. If the latter finding is accepted, the reasoning goes, then the Union's only duty under the collective-bargaining agreement was to arbitrate the seniority issue, and the Union discharged this

duty. Therefore there could be no violation of the fair-representation duty.

We disagree with this conclusion. All of the evidence at trial indicated that the Union knew that the purchase agreement existed, but did not know its terms, especially that it contained language of assumption. Thus the language of the purchase agreement played no role in the Union's decision not to negotiate; at most that language was a fortuitous circumstance that relates to what would have happened had it negotiated, not to what actually did occur. There is evidence that supports the inferences that the Local refused to act to protect plaintiffs from a known risk to their seniority and deceived them in the process. This establishes a violation of the fair-representation duty.

The District Court also reasoned that the Union had no reason to know that plaintiffs' seniority was in jeopardy until the lay-offs began in the first week of March 1983, so it had no duty to negotiate before then. But if Lessmann's testimony is accepted, and in this context it must be, then it appears that the Union knew within one or two days of the purchase that Metz would treat plaintiffs as new hires. At that point, it could not refuse to represent plaintiffs' interests.

Finally, the District Court ruled that any negotiated solution would have to have been submitted to a ratification vote by the affected employees, and, since the Nicholas Street employees greatly outnumbered the Leavenworth workers (78 full-time and 33 part-time to 41 full-time and 21 part-time, District Court Ex. 3, at 2), any solution treating the Leavenworth group more favorably

than the other employees would have been defeated. Thus negotiation would have been futile, and the Union should not be held liable for failing to undertake a futile effort. We note first that this argument goes to the issue of the proper remedy, not to whether the Union acted in bad faith in failing to negotiate. And second, assuming that only the Leavenworth and Nicholas Street employees would have voted (we cannot determine from the record who would have had the right to vote,[1] and the parties before us disagree on the issue), it simply does not appear that *any* proposed solution would have favored one or the other group exclusively. Indeed, the most probable compromise, dove-tailing the two groups, would have benefitted the seventy or eighty most senior employees in the two groups, and these would have been a majority of the voters.

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[1] There are different statements in the record. Clausen testified that every Union member in Omaha (a group that included more than just the Metz and former IBC workers) had the right to vote on whether to ratify the general collective-bargaining contract initially. Tr. I:134. Harry Smith, the Local's attorney, testified that only the Leavenworth and Nicholas Street members would have voted on a negotiated solution to Metz's consolidation of operations at the Leavenworth plant, *id.* at 166. The jury was not obliged to believe either of these witnesses. The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely a declaratory judgment and perhaps nominal damages.

In support of the judgment n.o.v., defendants argue that the Union would have breached its duty of fair representation to the Nicholas Street employees if it have negotiated to protect plaintiffs' antagonistic interests. But this overlooks the good-faith element of the duty. There is evidence to support a finding that the Union was dishonest in its representation of plaintiffs. If, however, the Union had in good faith discharged its duty to plaintiffs by negotiating with Metz, it does not follow that it would have represented the Nicholas employees in bad faith. A Union can represent conflicting interests, without fear of violating the fair-representation duty, so long as it does so in good faith. See, *e.g., Ryan v. New York Newspaper Printing Pressmen's Union No. 2*, 590 F.2d 451 (2d Cir. 1979).

Defendants also argue that the evidence was uncontroverted that, had the Union negotiated the seniority issue with Metz before the lay-offs, Metz would have refused to make any concessions and would have laid off the plaintiffs anyway. This, again, is an argument about the appropriate relief, not whether the Union violated its duty. That negotiation would have been futile does not negate the Union's liability for bad-faith failure to negotiate; at most it demonstrates that plaintiffs did not suffer any ascertainable harm as a result of the breach of duty. Whether this is so must be determined at the remedies trial on remand.

B.

The jury also found that the Union violated its fair-representation duty in the way it handled the arbitration.

The evidence on this issue, again construed most favorably for plaintiffs, was that Metz mailed lay-off notices to some of plaintiffs about March 1, 1983, and to the others about a week later. A grievance was filed on about March 4. On March 12, 1983, the Union held a meeting of the general membership of all of its Omaha bargaining units, at which it announced that it would arbitrate the seniority dispute caused by the layoffs, but would remain neutral as between the competing groups. Each group was asked to appoint two representatives to appear at the arbitration.

Plaintiff James Walker testified that he had the following exchange with the Local's president during the March 12 meeting:

Q. What did you ask and who were you asking?

A. Mr. Clausen.

Q. What did you ask?

A. I [asked] him would he have the purchase agreement at our Arbitration Hearing.

Q. Did he respond?

A. Yes. He said he would have it there.

Tr. I:185.

Walker and another plaintiff, William Marsh, were chosen to represent the former IBC employees at the arbitration. On March 19, 1983, they met with several Union representatives, including Harry Smith, the Local's attorney, and Clausen in Sioux City, Iowa, to discuss the arbitration. The representatives of the Nicholas Street

employees met with those officials later that day. The Union advised each group that it could retain independent counsel for the arbitration, and that any member of either group who wanted to testify at the arbitration could do so. At this meeting, no one asked the Union officials whether the purchase agreement would be introduced at the arbitration; Walker testified at trial that he "left that up to the – to the Union man." Tr. I:194.

Smith, the Local's attorney, handled the arbitration. He never asked for or looked at a copy of the purchase agreement before the arbitration. Instead, he telephoned Lessmann after the grievance was filed and, while they discussed the arbitration procedure, Lessmann told him that the transaction was merely a sale of assets, which did not obligate Metz to honor plaintiffs' seniority. Smith accepted Lessmann's description of the contract, and he made no further effort to investigate its terms. He was, however, present at the March 12 meeting when Clausen told Walker that the agreement would be introduced, or at any rate be available, at the arbitration.

At the arbitration, Smith called several employees from each of the competing groups to testify. Aside from these employees, the only other witness at the arbitration was Lessmann, who was called by Smith to testify about the terms of the purchase agreement. Lessmann told the arbitrator that the contract provided for a sale of assets from IBC to Metz, and, while Metz had agreed to maintain certain benefits – other than seniority – that the employees had obtained from IBC, he testified that the contract did not require Metz to assume their seniority. Metz's past practice had been to treat "acquired" employees just as it treated the former IBC workers, as

new hires, and Metz had no intention of changing that practice with the IBC transaction.

The purchase agreement itself was not given to the arbitrator, and there was no suggestion at that hearing that the language of the contract deviated in any way from Lessmann's description, much less that it contained language, in Sections 3.1(c) and 3.2(b), to the effect that Metz agreed to assume IBC's collective-bargaining agreement with plaintiffs *in toto*. The arbitrator's decision reflected this; among his findings of undisputed fact was:

> Third, there was no agreement between the two companies with respect to the status of the [IBC] employees upon the transfer of the assets of that Company to Metz.

P. Ex. 3, at 6.

In addition, Clausen testified at trial that his position from the time of the purchase was that Metz had assumed IBC's collective-bargaining agreement in full and was bound to honor plaintiffs' seniority. He testified that Smith must have known his stance, and he could not explain why Smith took a position contrary to his.[2] Clausen was present at the arbitration, but Smith did not call on him to testify.

On this record, we have no trouble concluding that the jury could have found a violation of the duty of fair representation. The jury could have inferred that Clausen

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[2] In a post-hearing brief, Smith did argue that Metz had assumed the IBC collective-bargaining agreement, but he did not supply a copy of, or quote from, the purchase agreement in support of this argument.

lied when he told Walker that he would have the purchase agreement at the arbitration. The District Court acknowledged that this inference was possible, but ruled that a deception by Clausen could not establish a violation of the fair-representation duty because

> Mr. Walker and the other IBC employees knew the attorney [rather than Clausen] was handling the grievance hearing. Thus, even if the jury found that Mr. Clausen lied to Mr. Walker about the sales contract, that finding does not support the conclusion the Union's attorney treated the IBC employees and their claims dishonestly.

Thomas v. Bakery, Confectionery and Tobacco Workers Union Local #433, No. CV 83-0-652 (D. Neb. Aug. 13, 1986), at 18-19. This analysis misconstrues the legal issue, which is whether the Union, not any one of its officers or agents, acted in complete good faith with regard to plaintiffs' interests. Clausen acted on behalf of the Union, and if he deceived Walker about whether the sales contract would be placed before the arbitrator, that deception is attributable to the Local. And if the Local, through its president, deceived Walker about producing the sales contract at the arbitration, it violated its fair-representation duty regardless of whether the Local's attorney conducted the arbitration in good faith.

Other evidence also supports the jury finding on this issue. Smith, the Local's attorney, did not investigate the terms of the purchase agreement any further than discussing them briefly with Lessmann, who as Metz's general counsel was obviously interested in the outcome of the arbitration. Smith accepted Lessmann's account apparently without question, and that description was

the only evidence of the contract put before the arbitrator. Yet Smith knew that the words of the contract would be material to the dispute if they provided for assumption of plaintiffs' seniority, Tr. I:153-54, and, according to Clausen, Smith must have known the position Clausen took as president of the Local – that Metz had assumed the IBC collective-bargaining agreement *in toto*. In addition, Smith was present at the March 12 meeting when Clausen told Walker that the purchase agreement would be at the arbitration.

This evidence was sufficient for the jury to find at least that Smith was perfunctory in his representation of plaintiffs' interests. The District Court apparently thought so too, but it felt constrained to follow one of our decisions, *Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354 (8th Cir. 1985), *after remand*, 819 F.2d 191 (8th Cir. 1987), which, in its view, required entry of judgment n.o.v. *Smegal* involved a complex series of transactions, including a partial sale of assets, from plaintiffs' former employer to their new employer. One of the agreements provided that the entire transaction was conditioned on the new employer's reaching a satisfactory labor agreement with the union within a short time. The union was unaware of the condition, and negotiated an agreement within the allotted time. Later, after the plaintiff union members discovered the condition, they sued the union on the theory that, had the union investigated the contracts and found the condition, it would have had much greater bargaining power and could have negotiated a labor agreement that would have been much more favorable to them. We held that the union's failure to review the language of the agreements was at most negligence,

and thus insufficient to establish a violation of the duty of fair representation.

This case is distinguishable. In *Smegal* the union had no reason to think that the agreement contained terms favorable to the plaintiffs'; nor was the situation one where the words of the contract between the two employers could have resolved the underlying labor issue: the contract provided only that the transaction was contingent on the purchaser's reaching a satisfactory labor agreement with the union within a certain time. Here, by contrast, the major issue at the arbitration was whether Metz had agreed to assume plaintiffs' seniority rights from IBC. This issue turned primarily on the terms of the contract between Metz and IBC. The Union did argue to the arbitrator that Metz expressly agreed to assume those rights, but the only evidence it produced to support this theory was Metz's interpretation of the agreement, and, of course, it was against Metz's interests to construe the contract to require assumption. Lessmann's testimony gave no indication to the arbitrator that the purchase agreement contained broad language of assumption that supported plaintiffs' theory. In addition, in light of Clausen's belief that Metz had assumed IBC's labor agreement and Walker's request that the Union produce the purchase contract at the arbitration, the Union should at least have requested a copy of it from Metz. The jury could reasonably have found that the Union's failure to make any attempt to obtain or introduce the purchase agreement at the arbitration reduced its representation on the express-assumption theory to a

mere formality, an empty gesture. This is the essence of perfunctory representation.[3]

III.

The District Court held that even if the Union violated the duty of fair representation, the evidence was insufficient to establish that the breach tainted the arbitration, so the arbitrator's decision would bind the parties in any event. See *Hines, supra,* 424 U.S. at 567-72. Even though the only evidence of the purchase agreement before the arbitrator was Lessmann's interpretation of it, the Court reasoned that this was sufficient to inform the arbitrator of the fact of the sale, which was the "essential" fact. Moreover, if the arbitrator thought that the contract terms themselves were essential, he could have requested a copy of the agreement; that he did not

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[3] Plaintiffs argue that since Smith is an attorney, the Union should be held to the standard of conduct of a reasonable attorney in its handling of the arbitration, and any breach of that standard establishes a violation of the duty of fair representation. We have rejected this argument before, see *Curtis v. United Transportation Union,* 700 F.2d 457, 459 (8th Cir. 1983), and we do so again here. A union representative need not be a lawyer and should not be held to a lawyer's standard of care.

Defendants argue, by contrast, that at worst Smith was guilty of mere negligence in not offering the purchase contract in evidence. That kind of default is not sufficiently grave to deserve condemnation as "perfunctory." See *Stevens v. Teamsters Local 600,* 794 F.2d 376 (8th Cir. 1986). Even if this argument is correct, the jury verdict here must still be upheld, because Clausen's deception of Walker could have been found to amount to dishonesty, which constitutes a breach of the duty of fair representation, even if the Union's conduct was otherwise better than perfunctory.

demonstrates that the terms were not essential. Since the arbitrator had all of the essential facts before him, the arbitral process was not tainted.

We disagree. The question for the arbitrator was whether Metz had broken the labor contract, and this turned in part on whether Metz had agreed to assume IBC's labor contract. The most important evidence on this issue was the language of Metz's promise to IBC, for the starting point in any interpretation of an agreement is the contract itself. In addition, we disagree that the fact of the sale was the "essential" fact; on this issue the essential fact was whether Metz promised to assume plaintiffs' seniority rights. And the fact that the arbitrator did not ask for a copy of the contract may indicate only that he had no reason to believe that the contract terms differed from Lessmann's description, not that he deemed the contract unessential.

The jury was within its rights in finding that the absence of the contract "seriously undermine[d] the integrity of the arbitral process." *Hines*, 424 U.S. at 567. The arbitrator had no knowledge of the contract's assumption clause, which was the strongest evidence in support of plaintiffs' legal theory. Without that evidence, plaintiffs' chances of proving express assumption were practically nil, especially in light of Lessmann's testimony. With that evidence, their chances would have been much greater. Thus the failure to present the contract to the arbitrator was a serious flaw in the procedure.

IV.

Metz and the Union argue that, if the judgment n.o.v. in their favor is not to be affirmed, they should at least receive a new trial. The Union claims that the jury instruction on whether the violation of the fair-representation duty tainted the arbitration was erroneous in three respects: (1) it stated the wrong legal standard; (2) it did not adequately define the terms "tainted" and "seriously undermined"; and (3) it violated the policy of finality of arbitral decisions.

The instruction read in part:

> If you find that the plaintiffs have proven . . . that the Union breached its duty of fair representation . . . , then you must . . . determine whether the plaintiffs' interests were prejudiced by the breach. . . .
>
> In order to [prove] that the interests of the plaintiffs were prejudiced by the breach . . . plaintiffs must prove by a preponderance of the evidence that the conduct of the . . . Union tainted, that is seriously undermined, the integrity of the arbitration process.

Designated Record, at 91. This accurately stated the law, *Hines*, 424 U.S. at 567, and we find no error in it. The meaning of the words "tainted" and "seriously undermined" is not beyond the ken of a reasonable juror, so no definition was necessary. And the policy of finality of arbitration decisions was considered and accommodated by the Supreme Court in fashioning this standard. See *id.* at 567-72.

Metz argues that the Court erred in submitting to the jury the question whether the purchase agreement bound Metz to assume IBC's labor obligations. We disagree. While construction of an unambiguous contract is a matter of law for the court, if the language is ambiguous its meaning becomes a question of fact for the jury. Here, in light of Metz's evidence of its intent and past practice, the assumption language in sections 1.1(c), 3.1(c), and 3.2(b) was sufficiently ambiguous to present a jury question. Metz also argues that there is no evidence to support the jury's finding that it expressly or impliedly assumed the seniority provisions of IBC's labor contract, but we find the language of the purchase agreement itself sufficient to support that finding.

V.

We reverse the judgment n.o.v. and affirm the denial of a new trial. We remand this cause for reinstatement of the jury's verdict and for determination of relief.

It is so ordered.

HENLEY, Senior Circuit Judge, concurring and dissenting.

Even though the evidence in question is less substantial than one might desire it to be, I can agree with the majority that the jury could have inferred that Clausen knew plaintiffs' jobs were at risk, refused to negotiate, and then lied about plaintiffs' precarious situation. I could further agree that the Union had a duty to negotiate and breached it. Even so I would affirm judgment n.o.v on this aspect of the case because on the record it is

clear that there is no causal relationship between failure of the Union to negotiate and any injury to plaintiffs. As the district court found:

> The evidence is uncontradicted that the Union must obtain majority approval by its membership of any negotiated contract provision. Similarly, the evidence is uncontradicted that the IBC employees became Metz employees on February 19, 1983. Further, as stated earlier, the IBC employees and the Metz workers possessed antagonistic interests. And, finally, the evidence stands undisputed that the Metz group outnumbered the IBC unit by almost two to one. Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all the IBC employees (endtailing the Metz workers) or for some of them (dovetailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests. Accordingly, the jury's verdict cannot stand since it necessarily rests on the irrational inference from the evidence that the majority group would have voted against its own interest. Further, insofar as the Union had a right to reasonably believe that seniority negotiations would be futile or would not result in an agreement favorable to the IBC workers, the evidence cannot support a finding that the Union acted arbitrarily or dishonestly in failing to negotiate with Metz.

This reasoning is most persuasive and I find unacceptable the speculation of the majority that a possible

compromise of dovetailing is sufficient to support a finding of liability. *Barrett v. Thorofare Markets, Inc.*, 452 F.Supp. 880, 883-84 (W.D. Penn. 1978) (plaintiffs could not prove how local would have voted on pension agreement), cited with approval in *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 580-81 (8th Cir. 1981). If there is no showing of probable injury, failure to negotiate should not call for reversal and remand for determination of a remedy.

With respect to the Union's failure to introduce into evidence before the arbitrator the Metz-IBC sales agreement, I find at most negligence for which no liability attaches.

In the first place, it is somewhat anomalous to suggest that the Union had a duty to negotiate to protect the IBC employees' seniority rights, but even though they did not do so, those employees' rights were protected by the contract nonetheless. If the contract so clearly gave that protection, what purpose would negotiations have served? A second, but related, problem with the jury's verdict is that the contract is simply too vague on the subject of the IBC employees' rights upon transfer to Metz to assume, as the court appears to do, that contract introduction would have made any difference at the arbitration. While the agreement provides in two separate provisions that Metz was (1) to assume the IBC collective bargaining agreement, and (2) to enter into a novation with the IBC employees respecting that agreement, it nowhere provides that the IBC employees would be dovetailed with the Metz employees or that they would not be endtailed. Both groups were covered by an industry-wide agreement, which did not provide for either

dovetailing or endtailing. The agreement as it applies to Metz and its original employees did not provide for dovetailing should Metz acquire a new company, and Metz could not have added a term to that agreement without the Union's participation simply by entering into a sales contract with IBC. *See, e.g., NLRB v. Katz*, 369 U.S. 736 (1962) (employer who changed wage and benefit provisions without consulting union violated duty to bargain collectively under the NLRA). The arbitrator correctly applied the rule that seniority rights can "exist only by virtue of and to the extent provided by a bargaining agreement." Arbitrator's Decision and Award at 6 (citing *Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968) (en banc)). Thus, with respect to seniority undoubtedly the sales agreement conferred no greater rights than the bargaining agreements, and the arbitrator ruled that those agreements did not dispose of the issue.

Consequently, although we as well as a jury might consider the Union's actions with regard to the arbitration distasteful, the plaintiffs simply have not shown that the Union's conduct in fact was a cause of any injury to them, and thus there can be no liability. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976) (focus is on "whether there is a substantial reason to believe that a union breach of duty contributed to the erroneous outcome"); *Humphrey v. Moore*, 375 U.S. 335, 351 (1964) (agreeing with trial court it was "idle speculation" for employees to assume result of hearing "would have been different had the matter been differently presented" by the union); *Anderson*, 641 F.2d at 580-81, 580 n.8, and cases there cited.

While I agree with the court that we should affirm the denial of a new trial, largely upon the findings and reasoning of the district court, I would affirm the judgment n.o.v. as well. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS JR., et al., Plaintiffs, vs. BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #442, et al., (sic) Defendants.	)	CV 83-0-652 ORDER (Filed August 13, 1986)

This matter is before the Court upon the Court's reconsideration of the motion (filing 50) of the defendant Metz Baking Co. for judgment notwithstanding the verdict, or in the alternative for a new trial, and the motion (filing 52) of the defendant Union for judgment notwithstanding the verdict, or in the alternative for a new trial. The Court, after a review of the briefs and the evidence in conjunction with the applicable law, finds that the motions for judgment notwithstanding the verdict should be granted and that the motions for new trial should be denied.

BACKGROUND

In this civil action, the plaintiffs, former employees of Interstate Brands Corporation and employees of defendant, Metz Baking Company filed suit against two defendants, the Bakery, Confectionery and Tobacco Workers Union Local No. 433 and the Metz Baking Company.

The defendant Metz Baking Company, with its principal place of business in Sioux City, Iowa, operated a bakery facility in Omaha, Nebraska, at 4383 Nicholas Street in 1983. Interstate Brands Corporation, at that time, also operated a bakery facility in Omaha, Nebraska, between 24th and 25th on Leavenworth Street in Omaha. In January, 1983, representatives of both companies agreed upon the sale of Interstate Brands Omaha bakery facility to Metz. The sale was closed on February 19, 1983, and Metz took possession of the plant, equipment and routes of Interstate Brands on February 21, 1983. Metz operated the Leavenworth Street bakery facilities without change until March 2, 1983. At that time, Metz consolidated all production at the Leavenworth Street plant and transferred the employees from the Nicholas Street plant to Leavenworth Street. This resulted in the lay-off of a substantial number of Interstate employees who had previously worked at the Leavenworth Street plant. Metz treated the former Interstate Brands' employees as new hires and placed (endtailed) them at the bottom of the seniority list which served as the basis for the lay-offs.

The defendant Union, Local No. 433, represented the employees at both facilities. The collective bargaining agreements for both bargaining units were identical.

A grievance was filed by the Union for the employees on the Interstate Brands' seniority list which alleged that the seniority provisions of the contract were unfairly and improperly implemented by the defendant Metz. The matter proceeded to arbitration before Mr. James A. Doyle on April 26, 1983. The Union took a neutral position. Employees on the seniority list of Metz and the seniority list of Interstate Brands, together with

the representatives of Metz, appeared and testified. The arbitrator denied the grievance which denial had the effect of upholding the action of Metz in laying off plaintiffs.

The defendant Local Union claims that it took a neutral position at the arbitration hearing because it represented both groups of employees. The defendant Local Union further claims that it represented both groups of employees in a fair and honest manner and fulfilled its duty to fairly represent all parties to the arbitration proceeding, including the plaintiffs.

The defendant Metz alleges that oral testimony by the witnesses at the arbitration hearing accurately informed the arbitrator of the contents of the sales contract between Interstate Brands Corporation and Metz Baking Company and that the decision of the arbitrator was fair, reasonable and proper under the circumstances.

DISCUSSION

The case was bifurcated for purposes of trial. The issue of liability was tried before a jury. The defendants moved for a directed verdict. The Court allowed the case to go to the jury with the admonition that even if a Court determines that a motion for directed verdict should be granted, it is considered better practice for a Court to send the case to the jury without directing a verdict and to then pass on the sufficiency of the evidence under a post-verdict motion. C. Wright and A. Miller, *Federal Practice and Procedure* § 2533 (1971); *Tackett v. Kidder,* 616 F.2d 1050, 1052-53 (8th Cir. 1980). The jury returned a special verdict finding in favor of the plaintiffs and against the

defendants. (Filing 49–Attached as Appendix A). Since this case was bifurcated for trial, the Court finds it is appropriate to rule on the motion for judgment notwithstanding the verdict at this time rather than proceeding with a lengthy and costly trial of the damages issues.

"The standard for granting judgment notwithstanding the verdict is the same as for a directed verdict." *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235 (8th Cir. 1980), *citing Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968). As the Eighth Circuit stated in *Lord v. Wilkerson*, 542 F.2d 1034, 1035 (8th Cir. 1976):

> A motion for a directed verdict should be granted "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Barclay v. Burlington Northern, Inc.*, 536 F.2d 263, 267 (8th Cir. 1976); *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir. 1975). As this Court has noted,
>
> > [A] motion for a directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. * * * In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. (Citations omitted.)
>
> *Vickers v. Gifford-Hill & Co.*, 534 F.2d 1311, 1315 (8th Cir. 1976), *quoting Giordano v. Lee*, 434 F.2d 1227, 1231 (8th Cir. 1970), *cert. denied*, 403 U.S. 931 (1971).

> *See also Voegeli v. Lewis*, 568 F.2d 89, 92 (8th Cir. 1977); *Banks v. Koehring Co.*, 538 F.2d 176, 178 (8th Cir. 1976); *Griggs v. Firestone Tire and Rubber Co.*, 513 F.2d 851, 857 (8th Cir.), *cert denied*, 423 U.S. 865 (1975).

Lord v. Wilkerson, 542 F.2d at 1035. Therefore, the Court must view the evidence and legitimate inferences from the evidence in the light most favorable to the nonmoving party. However, a mere "scintilla" of evidence cannot support a verdict. *Tackett v. Kidder*, 616 F.2d 1050, 1052-53 (8th Cir. 1980).

The jury found that the union breached its duty of fair representation to the plaintiffs by (a) failing to negotiate with defendant Metz in regard to job seniority upon Metz' purchase of IBC's Omaha facility and by (b) the manner in which the Union handled and processed the grievance and arbitration proceeding.

After a careful review of the evidence, the Court concludes that the jury verdict must be set aside and judgment should be entered for the defendants.

In this case, the arbitrator's decision in favor of Metz Baking cannot be reviewed unless the Union was found to have breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-69 (1976); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293 (9th Cir.), *cert. denied*, 459 U.S. 990 (1982); *see also Abernathy v. U.S. Postal Service*, 740 F.2d 6112 (8th Cir. 1984). Thus, Metz' alleged liability for breach of contract does not become an issue unless it is determined that the Union breached its duty of fair representation.

The duty of fair representation imposes upon the Union, as exclusive bargaining agent in the negotiation and administration of the collective bargaining contract, a responsibility and duty fairly to represent, as individuals as well as collectively, the employees within the bargaining unit. *Smith,* 619 F.2d at 1235, *citing Humphrey v. Moore,* 375 U.S. 335, 342 (1964).

The Eighth Circuit has described in detail the scope of the duty of fair representation:

> . While the scope of duty of fair representation has never been precisely defined, it "is a legal term of art, incapable of precise definition," and calls for an ad hoc review of each factual situation, *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* UAW, 469 F.2d 181, 182 (4th Cir. 1972), its evolution through the fires of court decisions leaves no doubt about its purpose. *St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters,* 422 F.2d 128, 130 (6th Cir. 1969). In particular,"the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes,* 386 U.S. at 182.
>
> In order to meet its purpose, the scope of the duty of fair representation is in some ways very broad. The responsibility fairly to represent employees is equal in scope to the union's broad authority in the negotiation and administration of the collective bargaining agreement. *Humphrey v. Moore,* 375 U.S. 335, 342 (1964). Thus the duty attaches to all stages of the negotiation and administration process and is owed to all

employees within the unit represented. However, because of the need to balance the individual interests of employees with their collective interests, the duty of fair representation must not be construed to subvert the basic purposes of organized labor by inhibiting union representation of collective interests. The Supreme Court has stated that in the negotiation process, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. at 338. The standard by which to measure union conduct was further defined in *Vaca v. Sipes*, 386 U.S. 171 (1967). In the administration of the collective bargaining agreement, the union has "a statutory obligation to serve the interests of all members [of a designated unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. *See also King v. Space Carriers, Inc.*, 608 F.2d 283, 286-287 (8th Cir. 1979).

The Fourth Circuit Court of Appeals clearly articulated the import of *Vaca* in *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, UAW, 469 F.2d 181, 183 (4th Cir. 1972):

> A union must conform its behavior to each of these three separate standards. First, it must treat fractions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete

> good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.
>
> * * * * * * * *
>
> * * * Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Smith, 619 F.2d at 1236-37.

First, with regard to the jury's finding that the Union breached its duty of fair representation by failing to negotiate with Metz in regard to job seniority upon Metz' purchase of IBC's Omaha facility, the jury found that Metz both expressly and impliedly assumed IBC's collective bargaining agreement with the Union. If, indeed, the contract was assumed, then the Union had the duty to utilize the contractual grievance procedure to protect the IBC's contractual rights, which duty it fulfilled. Arbitration was necessary to determine the proper interpretation of the seniority provisions since the contract was silent on the subject of assembling one work force from two bargaining units.

In any event, even if this Court were to determine that the Union had a duty to negotiate under these circumstances there was insufficient evidence from which a jury could reasonably infer that the Union breached its duty. All the evidence leads to the conclusion that the

Union had no reason to believe that it needed to negotiate with Metz about seniority until Metz began laying off workers. Also, either agreement provided for renegotiation. Thus, the Union had no reason to believe that it could force Metz to renegotiate seniority provisions or that it could successfully renegotiate a more favorable situation for plaintiffs. Even so, in negotiating or renegotiating a collective bargaining agreement, "the sole inquiry is whether under all the circumstances the Union has considered the interests of *all* of its members." *Smith v. Joseph E. Seagram & Sons*, 634 F.Supp. 44, 47 (W.D. Ky. 1985). In this case, the jury could not properly find that the Union breached a duty to negotiate with Metz to obtain more favorable treatment for plaintiffs over Metz' workers. The Union was obligated to fairly consider the interests of original Metz' workers as well. Therefore, there was no causal connection between a failure to negotiate, if such a duty existed, and any harm that came to the plaintiffs.

The evidence was undisputed that Metz was operating, in tandem, the Leavenworth Street and Nicholas Street plants between February 19, and March 2, 1983. Marlin Lessman, employed by Metz as Vice-President, Secretary and General Counsel, testified that Metz recognized the seniority of the IBC workers during the time the plants were run in tandem. The IBC employees saw no changes at work except the company's name on their paychecks. There is simply no evidence from which the jury could reasonably infer that the Union acted arbitrarily since the Union was reasonable in believing that no IBC seniority problem existed until March 1, 1983, when Metz sent out layoff notices. And, at that time, the

Union began processing a grievance for the IBC employees. The Union did not stand obligated to investigate the company's position at an earlier time, since the company was operating the two plants as separate operations. *Smegal v. Gateway Foods*, 763 F.2d 354 (8th Cir. 1985).

There was a conflict in testimony between Marlin Lessman and Bernard Clausen, the Baker's Union President. Mr. Lessman testified he told Mr. Clausen that Metz intended to treat the IBC workers as new hires. Clausen denies that Lessman told him that. One witness, James Walker, testified that Mr. Clausen told one IBC employee, after the purchase of the plant, that his job was secure – "not to worry." The witness could not pinpoint when Clausen made the statement to him. He did place the statement at a time after Metz purchased the plant, but before the layoff notices. Assuming that the jury (a) believed Walker's testimony (b) considered Clausen's actions dishonest and (c) that such actions deterred the IBC workers from requesting that the Union bargain with Metz, the evidence still does not support the jury's verdict.

The evidence is uncontradicted that the Union must obtain majority approval by its membership of any negotiated contract provision. Similarly, the evidence is uncontradicted that the IBC employees became Metz employees on February 19, 1983. Further, as stated earlier, the IBC employees and the Metz workers possessed antagonistic interests. And, finally, the evidence stands undisputed that the Metz group outnumbered the IBC unit by almost two to one. Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all

the IBC employees (endtailing the Metz workers) or for some of them (dovetailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests. Accordingly, the jury's verdict cannot stand since it necessarily rests on the irrational inference from the evidence that the majority group would have voted against its own interest. Further, insofar as the Union had a right to reasonably believe that seniority negotiations would be futile or would not result in an agreement favorable to the IBC workers, the evidence cannot support a finding that the Union acted arbitrarily or dishonestly in failing to negotiate with Metz.

The evidence was insufficient for a jury to reasonably find that negotiations between Metz and the Union would have affected the layoffs. The only testimony on point indicated that Metz intended to keep its own employees on the job when it transferred the Nicholas Street operation to the Leavenworth Street facility. The evidence was undisputed that Metz, in fact, endtailed the IBC employees covered by the collective bargaining contracts with the Operating Engineers Union and the Teamsters Union. No testimony contradicts Mr. Lessmann's statement that Metz felt that nothing in its sales contract with IBC prevented it from endtailing the IBC employees. Also, as stated earlier, the evidence does not support a conclusion that the Union membership would have approved a negotiated settlement to dovetail. Accordingly, Metz had no reason or inclination to agree to handle the layoffs in any other way.

The jury also found that the Union breached its duty of fair representation toward the IBC employees in the manner it handled the arbitration proceedings and because it did not present a copy of the sales contract between Metz and IBC to the Arbitrator. The Court finds that neither of these actions by the Union amounted to a breach of the Union's duty of fair representation, as a matter of law.

Resolving all conflicts in the evidence in favor of the plaintiffs and accepting their testimony in full, the evidence shows that the Union initiated a grievance on behalf of the IBC employees as soon as Metz issued layoff notices to the IBC employees. The IBC employees found the wording of the grievance satisfactory. The Union filed the grievance and requested arbitration of the grievance upon receiving the signed grievance from the IBC employees. The Union turned over the handling of the grievance to its attorney. The Union informed both groups it intended to take a neutral position in the arbitration. The Union allowed the IBC group and the Metz group to select their own representatives to participate in the arbitration.

The Union arranged for and attended meetings between the representatives of the two groups with the Union's attorney in Sioux City, Iowa. The meeting with the IBC employees lasted about ten minutes. The meeting for the Metz workers lasted about one-half hour. At the meetings with both groups, the employees discussed the reasons why they felt they should keep their jobs.

At the meeting with the Union attorney, one IBC employee (Walker) asked Clausen about the IBC-Metz

sales agreement. Clausen told him it would be at the arbitration hearing. The IBC employees did not discuss Metz' assumption of the IBC collective bargaining agreement or the unilateral change of their seniority date by Metz. The Union attorney advised the IBC employees they could hire other counsel for the arbitration, but did not tell them (Marsh) that they had to pay for such attorney. The Union attorney told them he believed the "successor" clause in the collective bargaining agreement would be "kicked out" by the court.

At the arbitration, the Union attorney met briefly before the hearing started with the witnesses for both groups. At no time during the hearing did the Union attorney restrict what any witness from either group said. None of the IBC witnesses testified at the arbitration hearing regarding the absence of or the need for production of the sales agreement at the hearing. The Union allowed anyone from either group (who wished to do so) to testify.

The evidence shows that the Union treated both the IBC employees and the Metz employees fairly and with substantial equality. The evidence cannot support a finding that the Union breached its duty of fair representation toward the IBC employees, unless the Union arbitrarily or dishonestly ignored the claimed significance of the written sales contract in advocating the interests of the IBC group at the arbitration proceedings. *Crusco v. Fisher & Bro. Inc.*, 458 F.Supp. 413, (S.D.N.Y. 1978).

If the Union improperly ignored the claimed significance of the written sales contract, the jury might have concluded that the Union attorney's abbreviated meeting

with the IBC employees and his failure to discuss certain issues with them rendered the Union's position less than neutral and rendered the Union's failure to submit a copy of the sales contract a breach of the Union's duty of fair representation.

With regard to the sales contract between Metz and IBC sufficient evidence existed for the jury to find that the Union's attorney discussed the nature of the contract only briefly with Lessmann prior to the arbitration. The evidence further supports the conclusion that the Union viewed the specific terms of the sales contract as "immaterial" to the arbitration hearing. The evidence further justifies a finding that the Union attorney relied upon Lessmann's representations both before and at the arbitration hearing concerning Metz's obligations under the sales contract. Nonetheless, that evidence, does not support a finding that the Union breached its duty of fair representation toward the IBC employees.

In a recent decision, the Eighth Circuit Court of Appeals confronted an identical set of facts in which a union allegedly improperly failed to investigate and examine a purchase contract between two companies. The Court found:

> We think this case requires analysis at two stages. The first is approximately July 6, 1981, when the operations were transferred. Up to then the Union had accepted the employers' representation that subcontracting was involved. It had not attempted to examine the contracts between National and Gateway. It was not aware of the leverage it could exert by refusing to make a 'satisfactory' agreement with

> Gateway. Although it had negotiated certain favorable terms for former National employees when hired by Gateway, the Union had pretty clearly worn its Gateway hat while negotiating. It refused to permit National employees to participate in the bargaining process. This was all consistent with acceptance of the subcontracting theory.
>
> * * *
>
> The first stage was carefully considered by the district court, and we agree with the conclusion reached. The proof as of that stage shows failure to investigate the transaction and failure to perceive a legal theory. 'Mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation.' *N.L.R.B. v. Am. Postal Wkrs., Union, Etc.*, 618 F.2d 1249, 1255, (8th Cir. 1980). If there were no second stage, summary judgment for defendants would have been appropriate.

Smegal v. Gateway Foods, 763 F.2d 354, 359 (8th Cir. 1985).

In *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), the Court, at length, defines arbitrary Union conduct and its basis in sound policy. The Court states:

> We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. *See e.g., Castelli*, 752 F.2d at 1482; *Dutrisac*, 749 F.2d at 1273; *Singer v. Flying Tiger Line, Inc.*, 652 F.2d at 1355; *Ness v. Safeway Stores, Inc.*, 598

F.2d 558, 560, (9th Cir. 1979); *see also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). We have said that a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing. *See Dutrisac*, 749 F.2d at 1273. In short, we do not attempt to second-guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued. We reaffirm that principle here.

Sound policy reasons militate against imposing liability on unions for errors of judgment made while representing their members in the collective bargaining process. In *Dutrisac*, we recognized that holding unions liable for such errors would serve ultimately to "defeat the employees' collective bargaining interest in having a strong and effective union." 749 F.2d at 1273. If unions were subject to liability for "judgment calls", it would necessarily undermine their discretion to act on behalf of their members and ultimately weaken their effectiveness. In the long run, the cost of recognizing such liability would be borne not by the unions but by their memberships. Not only would the direct costs of adverse judgments be passed on to the members in the form of increased dues, but, more importantly, unions would become increasingly reluctant to provide guidance to their members in collective bargaining disputes. Such a result would be inconsistent with our oft repeated commitment to construe narrowly the

> scope of duty of fair representation in order to preserve the unions' discretion to decide how best to balance the collective and individual interests that they represent.
>
> Freeing a union from liability for ordinary acts of negligence in the performance of its representational responsibilities requiring judgment on its part, reflects a balance of the union's organizational interest against the individual interests of its members. Our cases, and those of the Supreme Court, tip the balance in favor of the union, and accept the consequence of uncompensated loss sustained by an individual union member. Whether liability for a loss occasioned by ordinary negligence of the union might be spread more equitably among the membership as a whole, rather than be borne by the individual member who is harmed, is no longer an open question.

Peterson, 771 F.2d at 1254-55.

Even if the jury found that the Union's attorney inadequately investigated Metz' obligations under the sales contract with IBC, that lack of investigation can not be said to comprise a breach of the Union's duty of fair representation toward the IBC employees. *Hellums v. Quaker Oats Co.*, 760 F.2d 202 (8th Cir. 1985) ("We do not take issue with the finding of the District Court that Local 125 was negligent in its investigation. Mere negligence, however, does not rise to the level of a breach of the duty of fair representation." *Id.* at 206.)

Similarly, even if the jury found the Union attorney's view of the significance of the written sales contract

clearly wrong[1] the Union urges that such a finding does not support the conclusion the Union breached its duty of fair representation toward the IBC employees. Mere failure to perceive a legal theory does not comprise a breach of the Union's duty of fair representation. *Smegal v. Gateway Foods*, 763 F.2d 354, 359 (8th Cir. 1985); *Sanders v. Youthcraft Coats & Suits, Inc.*, 700 F.2d 1226 (8th Cir. 1983). Further, even if the jury found that the Union's attorney improperly relied upon Mr. Lessmann's testimony at the arbitration hearing because Lessmann inaccurately testified regarding Metz' obligations under the sales contract, that finding does not support the conclusion the Union violated its duty of fair representation toward the IBC employees. At most, the Union's actions comprised poor judgment. Such actions do not support the jury's verdict. *Taylor v. Belger Cartage Service*, 762 F.2d 665 (8th Cir. 1985).

In sum, then, the evidence before the jury, at most, showed that the Union acted negligently in regard to its handling of the written sales contract between Metz and IBC. Such a showing does not support the jury's finding that the Union committed a breach of its duty of fair representation toward the IBC employees on the basis of arbitrary or perfunctory conduct.

One IBC employee, Mr.Walker, testified that he asked President Clausen about the sales contract and Mr. Clausen said the Union would have it at the arbitration hearing. From that testimony, the jury might have concluded the Union lied to the IBC employees and treated

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[1] The jury evidently made such a finding because it found Metz expressly assumed the IBC collective bargaining contract with the Union.

their claims dishonestly. However, even that evidence, does not support the jury's verdict in light of the totality of the evidence. The Union's attorney, not Mr. Clausen, was handling the arbitration hearing. Mr. Walker and the other IBC employees know the attorney was handling the grievance hearing. Thus, even if the jury found that Mr. Clausen lied to Mr. Walker about the sales contract, that finding does not support the conclusion the Union's attorney treated the IBC employees and their claims dishonestly. Since it does not, no basis exists to find that the Union breached its duty of fair representation toward the IBC employees.

The Union's position finds additional support in the great weight of the other evidence. The Union's attorney did not know, personally, any of the IBC or Metz workers before he met with them in regard to the arbitration. No animus or other reason for him to treat the IBC employees dishonestly existed. Further, the evidence stands undisputed that the Union's attorney relied on Mr. Lessmann's statements about the contents of the sales contract because he trusted Lessmann, not because he wanted to deceive the IBC employees. So too, the evidence stands uncontroverted that the Union's attorney viewed the written sales agreement as immaterial to the arbitration hearing and as adequately presented in Mr. Lessmann's testimony at the hearing. Finally, all employees, who testified at trial and at the arbitration hearing, admitted that the Union's attorney in no way restricted their testimony. In sum, then, the great weight of evidence shows that the Union's agent, who handled the arbitration, in no way dealt with the IBC employees

dishonestly. And since the proof shows no deceit or dishonesty, the jury could not properly find that the Union breached its duty of fair representation. As stated earlier, the Union attorney's mere failure to assert a possible claim under the sales contract does not comprise a breach of duty. *Russom v. Sears, Roebuck & Co.*, 558 F.2d 439, 442 (8th Cir. 1977).

In summary, the jury's verdict in regard to the Union's breach of its duty toward the IBC employees cannot stand close scrutiny. The weight of the evidence shows that the Union treated both the IBC and the Metz groups fairly and without discrimination. At most, the Union exercised poor judgment in its handling of the sales contract issue. And, in no way did the Union's attorney deal with the IBC employees and their claim dishonestly. Thus, the jury cannot be allowed to "second-guess the arbitration strategy of the union attorney." *Johnson v. Jos. Schlitz Brewing Co.*, 581 F.Supp. 338, 344 (M.D.N.C. 1984). *See Liotta v. Nat'l Forge Co.*, 473 F.Supp. 1139, 1144 (W.D. Penn. 1979). As a result, the decision of the arbitrator must stand. The issue of Metz' alleged liability for breach of contract need not be reached.

In any event, even assuming the jury correctly found that the Union breached its duty of fair representation in its handling of the grievance at arbitration, the evidence does not support the conclusion the Union's actions tainted the arbitration award. In *Brown v. TWA*, 746 F.2d 1354 (8th Cir. 1984), the Court of Appeals indicated that tainting an arbitration award means denying the arbitrator *essential facts* upon which to make a ruling. Nothing in the evidence shows that Arbitrator Doyle did not have the essential facts of the case before him.

Arbitrator Doyle clearly knew of the sale. Further, the Arbitrator had Metz' interpretation of the sales contract. At most, the Arbitrator did not have the IBC employees' reading of the written sales agreement and their contentions as to its meaning.[2] In turn the jury had no basis to conclude that Arbitrator Doyle, as a result of the Union's actions or inactions, did not have all the facts necessary to make a valid decision. Indeed, if the Arbitrator felt that a copy of the written contract was necessary for his dispute determination, he possessed the right to ask for a copy of it. Therefore, the jury lacked an evidentiary basis to conclude that the Union's purported breach resulted in tainting the arbitration decision. Such a conclusion finds further support in the undisputed evidence that the collective bargaining agreement did not contain any language regarding how to merge the Metz and IBC seniority lists. And, the sales agreement, at most, obligated Metz to assume the IBC contract in full. Accordingly, nothing in the sales contract required Arbitrator Doyle to handle the merger issue differently. At most, the absent sales contract, even if Doyle agreed with the IBC employees, might have strengthened the IBC employees' case at arbitration. Anything beyond such a conclusion, lacks evidentiary support. And, that conclusion does not

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[2] In its brief to the Arbitrator, the Union did argue that Metz had assumed the IBC collective bargaining agreement. (Defendant's Ex. 108 at 5-6.) Further, the brief of the Union raised as an issue before the Arbitrator whether Metz had impliedly assumed IBC's contract by its conduct. (*Id.* 15 8.) Thus, the Union argues that the only matter not before the Arbitrator was the IBC employees' interpretation of the written sales contract.

support the jury's verdict. *Hardee v. North Carolina Allstate Service, Inc.*, 537 F.2d 1255, 1257-58 (4th Cir. 1976).

Accordingly, the Court finds that the jury verdict must be set aside and that the defendants' motions' (sic) for judgment notwithstanding the verdict should be sustained.

Accordingly,

IT IS ORDERED that the motion (filing 50) of defendant Metz Baking for judgment notwithstanding the verdict should be and hereby is granted. The alternative motion for new trial is denied.

IT IS FURTHER ORDERED that the motion (filing 52) of defendant Union for judgment notwithstanding the verdict should be and hereby is granted. The alternative motion for new trial is denied.

DATED this 13th day of August, 1986.

BY THE COURT:

/s/ C. Arlen Beam
C. ARLEN BEAM, CHIEF
JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 91-3549NE, 91-3553NE, 91-1563NE, 92-1591NE

Selman Thomas, Jr., et al.,	*	
	*	
Appellants,	*	Appeals from the
	*	United States
vs.	*	District Court for
	*	the District
Bakery, Confectionery, and Tobacco Workers International Union, Local #433; Metz Baking Company,	*	of Nebraska
	*	
	*	
Appellees,	*	
	*	
Curtis Burton; et al.,	*	
	*	
Interveners/Appellees.	*	

Caption intentionally shortened by Petitioners

JUDGMENT

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

Judge Beam took no part in the consideration or decision of this case.

February 12, 1993

A true copy.

ATTEST: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2214NE

Selman (Joe) Thomas, Jr., et al Appellants, vs. Bakery, Confectionery and Tobacco Workers Union, etc., et al, Appellees.	* * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

September 24, 1987

Order entered at the direction of the Court;

Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al.,	)	CV 83-0-652
Plaintiffs,	)	COURT'S CHARGE TO THE JURY
vs.	)	
BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433, et al.,	)	[Filed JUL 16 1985]
Defendants.	)	

* * *

Jury instructions numbers 1 through 7 and 14 through 25 intentionally omitted by counsel for the Petitioners.

INSTRUCTION NO. 8

Defendant Union acted as the exclusive collective bargaining representative for the production employees of Interstate Brands Corporation at its plant in Omaha, Nebraska, including plaintiffs in this case, and the production employees of defendant Metz at its plants in Omaha, Nebraska. As the collective bargaining representative of both groups of employees, defendant Union was obligated by law to represent both groups of employees fairly in its dealing with their employers in regard to

their rights under their collective bargaining agreements. This obligation is known as defendant Union's duty of fair representation.

A wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The duty of a union is to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary or perfunctory conduct. A breach of this duty occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, perfunctory, discriminatory, or in bad faith.

"Perfunctory" means without concern or solicitude, indifferent.

INSTRUCTION NO. 9

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporations's Omaha facility, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporations's Omaha facility:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

Honest, but mistaken, conduct may not be considered arbitrary, discriminatory or bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern may support a finding that the Union acted in an arbitrary or perfunctory manner.

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that had the Union negotiated the defendant Metz would not have laid off the plaintiffs in March, 1983.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union breached its duty of fair representation to the plaintiffs by failing to negotiate and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the defendant Union and

against the plaintiffs on plaintiffs' claim that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the plaintiffs and against the defendant Union on plaintiffs claim that the Union breached its duty of fair representation by failing to negotiate.

INSTRUCTION NO. 10

In addition, the plaintiffs allege the defendant Union committed a breach of its duty of fair representation toward the plaintiffs by the position taken between the seniority claims of plaintiffs and those of defendant Metz' employees in processing plaintiffs' grievance and/or by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance.

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs under either or both of these theories, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that in the investigating and processing of the plaintiffs' seniority claims and grievances:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

As you were instructed before, honest, but mistaken, conduct may not be considered arbitrary, discriminatory or bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern or solicitude or gave plaintiffs' claims and grievance only cursory attention may support a finding that the Union acted in an arbitrary or perfunctory manner.

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs in the investigation and processing of the plaintiffs' seniority claims and grievances, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union

breached its duty of fair representation to the plaintiffs in the investigating and processing of the plaintiffs' seniority claims and grievances and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of defendant Union and against the plaintiffs on plaintiffs' claim that the Union breached its duty of fair representation to the plaintiffs by the position taken and/or by not presenting a copy of the sales contract.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union breached its duty of fair representation to the plaintiffs and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you will proceed in your deliberations to consider the plaintiffs' claim against defendant Metz for breach of the Collective Bargaining Agreement.

In this regard you are instructed that a decision by an arbitrator in a labor arbitration proceeding is final and binding unless the Union breached its duty of fair representation to the prejudice of the plaintiffs as earlier explained in this instruction.

INSTRUCTION NO. 11

You are instructed that the failure of defendant Union to negotiate with defendant Metz in regard to plaintiffs' job seniority upon defendant Metz' purchase of the Interstate Brands Corporation's Omaha facility, or, the position taken by defendant Union as to the seniority claims of plaintiffs and those of defendant Metz' employees in the processing of plaintiffs' grievance do

not alone comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that those actions of defendant Union were done with hostility toward plaintiffs, discriminated against them, were done in bad faith or were arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs' interests.

You are further instructed that defendant Union's failure to present a copy of a sales agreement between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance does not by itself comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that such action of defendant Union was done with hostility toward plaintiffs, discriminated against them, was done in bad faith or was arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs interests.

INSTRUCTION NO. 12

Before reaching the issue of whether defendant Metz breached a Collective Bargaining Agreement, you must consider whether defendant Metz either agreed to be bound to the seniority provisions of the Collective Bargaining Agreement or otherwise assumed the seniority provisions of the Collective Bargaining Agreement that had been in effect between the plaintiffs and Interstate Brands Corporation. The defendant Metz was not bound by the substantive provisions of the Collective Bargaining

Agreement, unless the defendant Metz had agreed to or assumed all of the terms of the Collective Bargaining Agreement between plaintiffs and Interstate Brands Corporation or had agreed to or assumed those portions of the Collective Bargaining Agreement between plaintiffs and Interstate Brands Corporation that guaranteed plaintiffs seniority. In this regard, you must decide whether defendant Metz expressly agreed to be bound to the seniority provisions of the Collective Bargaining Agreement through the sales agreement executed between defendant Metz and Interstate Brands Corporation or impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its acts or omissions at the time of or after the effective date of the sales agreement.

In order to prevail on the issue that defendant Metz was bound by the seniority provisions of the Collective Bargaining Agreement that had been in effect between the plaintiffs and Interstate Brands Corporation, the plaintiffs must prove by a preponderance of the evidence at least one of the following elements:

1. That defendant Metz expressly agreed to be bound to the seniority provisions of the Collective Bargaining Agreement in the sales agreement executed between defendant Metz and Interstate Brands Corporation; or

2. That defendant Metz impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its actions.

You are instructed that the Metz purchase of substantially all of the assets of Interstate Brands Corporation, or

the continuing employment by Metz of substantially all of the Interstate Brands work force immediately after the effective date of the sales agreement do not, by themselves, comprise an implied assumption of the seniority provisions of the Interstate Brands Corporation-Union Collective Bargaining Agreement. However, whether defendant Metz misled the employees of Interstate Brands Corporation into believing that they were continuing their employment on seniority terms identical to those of their Interstate Brands Corporation employment is a factor that may be considered by you in determining whether Metz agreed to assume the seniority provisions of the Collective Bargaining Agreement.

Now in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that the defendant Metz was bound by the seniority provisions of the Collective Bargaining Agreement that had been in effect between the plaintiffs and the Interstate Brands Corporation, then you must find in favor of the defendants and against the plaintiffs on plaintiffs claim that Metz breached the Collective Bargaining Agreement.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that defendant Metz was bound by the seniority provisions of the Collective Bargaining Agreement, then you will proceed in your deliberations to consider whether defendant Metz breached the Collective Bargaining Agreement.

INSTRUCTION NO. 13

You are instructed that the burden is on the plaintiffs to prove by a preponderance of the evidence the following essential elements before they may prevail on their claim against defendant Metz for breach of the Collective Bargaining Agreement.

1. That Metz breached the seniority provisions of the Collective Bargaining Agreement by "endtailing," that is, treating the plaintiffs as new hires with a seniority date of February 19, 1983, and placing them at the bottom of the seniority list; *and*

2. That the plaintiffs were laid off as a result of the breach of the Collective Bargaining Agreement.

If, from the evidence, you find that the plaintiffs have proved by a preponderance of the evidence each and all the essential elements of their claim that Metz breached the Collective Bargaining Agreement and have previously found that Metz was bound by the seniority provisions of the Collective Bargaining Agreements, then you must find in favor of the plaintiffs and against defendant Metz on the plaintiffs' claim that Metz breached the Collective Bargaining Agreement.

If, however, from the evidence you do not find that the plaintiffs have proven by a preponderance of the evidence both of the essential elements outlined above, then you must find in favor of defendant Metz and against the plaintiffs on the plaintiffs' claim that Metz breached the Collective Bargaining Agreement.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al.,	)	CV 83-0-652
Plaintiffs,	)	SPECIAL VERDICT
vs.	)	(Filed
BAKER (sic), CONFECTIONERY AND TOBACCO WORKERS UNION, LOCAL #433, et al.,	)	Jul. 16, 1985)
Defendants.	)	

QUESTION NO. 1: Do you find from a preponderance of the evidence that defendant Union breached its duty of fair representation with respect to the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz' purchase of the Interstate Brands Corporation's Omaha facility?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES" , GO TO QUESTION 2.
IF YOUR ANSWER IS "NO", GO TO QUESTION 3.

QUESTION NO. 2: Do you find from a preponderance of the evidence that had the Union negotiated in regard to their job security upon defendant Metz' purchase of Interstate Brands Corporation's Omaha facility

the defendant Metz would not have laid off the plaintiffs in March, 1983?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 3.

QUESTION NO. 3: Do you find from a preponderance of the evidence that the Union breached its duty of fair representation with respect to the plaintiffs by the position taken by the Union with regard to the seniority claims of the plaintiffs and those of defendant Metz' previous employees in processing plaintiffs' grievance *and/or* by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 4. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 4: Do you find from a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 5. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 5: Do you find from a preponderance of the evidence that defendant Metz expressly

agreed to be bound to the seniority provisions of the Collective Bargaining Agreement in the sales agreement executed between defendant Metz and Interstate Brands Corporation?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 6.

QUESTION NO. 6: Do you find from a preponderance of the evidence that defendant Metz impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its actions?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES" TO EITHER OR BOTH OF QUESTIONS 5 OR 6, GO TO QUESTION 7. IF YOUR ANSWER IS "NO" TO *BOTH* QUESTIONS 5 *AND* 6, YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 7: Do you find from a preponderance of the evidence that defendant Metz breached the seniority provisions of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 8. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 8: Do you find from a preponderance of the evidence that the plaintiffs were laid off as

a result of the breach of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

YOUR FOREPERSON IS TO NOW DATE AND SIGN THIS SPECIAL VERDICT.

DATED this 16 day of July, 1985.

/s/ Ellen L. Zurcher
FOREPERSON

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, Jr., et al.	)	CIVIL NO. 83-0-652
Plaintiffs,	)	ORDER ON PRE-TRIAL CONFERENCE
vs.	)	
BAKERY, CONFECTIONERY, AND TOBACCO WORKERS UNION LOCAL NO. 433, and METZ BAKING COMPANY,	)	(Filed JUL 15, 1985)
Defendants.	)	

A final pre-trial conference was held on the ~~17th~~ [28th] day of February, 1985. Appearing for the parties as counsel were: Plaintiff, Thomas J. Young, 6910 Pacific, Suite 320, Omaha, Nebraska 68106; Defendant Metz Baking Company, Joe P. Cashen, 10306 Regency Parkway Drive, Omaha, Nebraska 68114; and Defendant Bakery, Confectionery and Tobacco Workers Union, Local No. 433, ~~Harry H.~~ [MacDonald] Smith, 632-640 Badgerow Building, Sioux City, Iowa 51101.

A. Exhibits in Evidence.

Exhibit lists will be prepared by each party for submission to the Court and all other parties pursuant to the Court's Amended Order Setting Progression of Jury Case, #9.

B. Foundation for Exhibits.

The Stipulation or waiver of foundation for all exhibits will be indicated on the exhibit list to be submitted pursuant to A, above.

C. Uncontroverted Facts.

The parties have agreed that the following may be accepted as established facts for purposes of this case only:

1. A General Statement of the Case:

The Defendant Metz Baking Company, with its principal place of business in Sioux City, Iowa, operated a bakery facility in Omaha, Nebraska at 4383 Nicholas Street in 1983. Interstate Brands Corporation, at that time, also operated a bakery facility in Omaha, Nebraska between 24th and 25th and Leavenworth Street. In January, 1983, representatives of both companies agreed upon the sale of Interstate Brands' Omaha bakery facility to Metz. The sale was closed on February 19, 1983, and Metz took possession of the plant, equipment and routes of Interstate Brands on February 21, 1983. Metz operated the Leavenworth Street bakery facilities without change until March 2, 1983. At that time, Metz consolidated all production in the Leavenworth Street plant and transferred the employees from the Nicholas Street plant to the Leavenworth Street plant. This resulted in the lay-off of a substantial number of Interstate employees who were previously working at the Leavenworth Street plant. Metz treated the former Interstate Brands' employees as new hires

and placed them at the bottom of the seniority list which served at the basis for the lay-offs.

The Defendant Union, Local No. 433, represented the employees at both facilities. A grievance was filed by the employees on the Interstate Brands' seniority list which alleged that the seniority provisions of the contract were unfairly and improperly implemented by the Defendant Metz. The matter proceeded to arbitration before Mr. James A. Doyle on April 26, 1983. The Union took a neutral position. Employees on the seniority list of Metz and the seniority list of Interstate Brands together with Metz appeared and testified. The arbitrator denied the grievance which had the result of upholding the action of Metz in laying off Plaintiffs.

The Plaintiffs in this action allege that the Defendants intentionally or negligently failed to introduce the agreement of sale entered into between Metz and Interstate Brands at the arbitration hearing. That this failure resulted in fraud or deceit being practiced upon the arbitrator by Metz and evidences a breach of the Defendant Union's duty to fairly represent the Plaintiffs. Further, Plaintiffs allege that the agreement between Metz and Interstate Brands evidenced that Metz was required to recognize and assume all obligations of Interstate Brands to its employees under that company's Collective Bargaining Agreement and that pursuant to the Collective Bargaining Agreement plant-wide seniority would control lay-offs and would have resulted in few, if any, lay-offs of former Interstate Brands' employees.

> The Defendant Metz alleges that oral testimony by the witnesses at the arbitration hearing accurately informed the arbitrator of the contents of the agreement between Metz and Interstate Brands and that the Arbitrator's decision was fair, reasonable and proper under the circumstances. The Defendant Local Union alleges that it took a neutral position at the arbitration hearing since it represented both groups of employees and it did so in a fair and honest manner and fulfilled its duty (sic) fairly represent all parties to the arbitration proceeding, including the Plaintiffs.

2. Jurisdiction is conferred on this Court by 29 U.S.C. 185 (a) and (c), as Amended, without respect to the amount in controversy and without regard to the citizenship of the parties.

3. That the Plaintiffs, at all times material to this action, were first, employees of IBC and then employees of Defendant, Metz Banking (sic) Company and represented exclusively by Defendant Bakery Confectionery and Tobacco Workers Union, Local No. 433.

4. That the Defendant Metz Baking Company was and is engaged in an industry substantially affecting interstate commerce.

5. That the Defendant Bakery Confectionery and Tobacco Workers Union, Local No. 433 is an unincorporated association and was, at all times material to this action, a labor organization and exclusive bargaining representative of the Plaintiffs.

6. That the Defendant Union entered into a Collective Bargaining Agreement on behalf of the Plaintiffs with Interstate Brands Corporation dated May 2, 1982.

7. That on or about February 19, 1983, Interstate Brands Corporation sold its bakery facility at 24th and Leavenworth Streets (sic) to the Defendant Metz Baking Company.

8. That on or about March 2, 1983, the Defendant Metz transferred its production facilities from its Nicholas Street plant to the 24th and Leavenworth Street plant.

9. That in March, 1983, when the Defendant Metz consolidated production at the Leavenworth Street plant, it layed-off more than forty of the Interstate employees by reason of Metz treating the former Interstate employees as new hires and placing them at the bottom of the seniority list.

10. That the Defendant Union never requested of the Defendant Metz at any time, negotiations with regard to the manner in which Metz compiled its seniority list and that the Defendant Union and the Defendant Metz at no time engaged in collective bargaining regarding the lay-offs of the Plaintiffs.

11. That a grievance was filed by the layed-off employees which alleged that the seniority provisions of the Collective Bargaining Agreement were unfairly and improperly implemented by Metz. That an arbitration hearing was held on April 26, 1983, before James A Doyle, arbitrator, appointed by mutual agreement of the Defendant Metz and Defendant Union.

12. That the arbitrator determined that the action of the Defendant Metz was proper and denied the grievance of the Plaintiffs.

13. That at the arbitration hearing the [written] agreement between Interstate Brands Corporation and Metz Baking Company dated February 19, 1983, was not introduced into evidence by either party to the arbitration.

14. That the nature and extent of the damages incurred by the Plaintiffs by reason of the action of the Defendants, if any, should not be tried to the Jury but should be determined by subsequent hearing before the Court.

CONTROVERTED OR UNRESOLVED ISSUES

1. Whether the meaning and legal effect of the Purchase Agreement between Defendant Metz and Interstate Brands Corporation constitutes a question of law not properly submitted to the jury.

2. Whether, at the arbitration hearing, the agreement between Interstate Brands Corporation and Metz Baking Company was accurately explained by the witnesses as to its content and the intention of the parties.

3. Whether the failure of the Defendant Union to submit the agreement between the Defendant Metz and Interstate Brands Corporation at the arbitration hearing, or the taking of a neutral position at the hearing, resulted in the Defendant Union breaching its duty of fair representation to the plaintiffs which resulted in prejudice to plaintiffs.

4. Whether the Defendant Union in failing to negotiate with the Defendant Metz with regard to the status of former Interstate Brands' employees upon sale of its facilities to the Defendant Metz violated its duty of fair representation to the plaintiffs under the National Labor Relations Act, as Amended. [which resulted in prejudice to plaintiffs.]

5. Whether the Defendant Metz, by reason of its agreement with Interstate Brands Corporation bound itself to assume and recognize all obligations of Interstate Brands Corporation to its employees under that company's Collective Bargaining Agreement.

6. Whether the Defendant Metz, if bound by the Collective Bargaining Agreement of Interstate Brands Corporation, layed-off the plaintiffs in violation of said agreement.

7. The nature and extent of the damages incurred by the plaintiffs by reason of the action of the defendants, if any, to be determined by subsequent hearing to the Court.

8. Whether a further arbitration constitutes the appropriate remedy. [This issue to be determined in a subsequent hearing to the Court.]

E. Elments of Proof.

Each party submits to the Court, by attachment hereto, its statement of the elements of proof of its own claims or affirmative defenses and the claims or affirmative defenses of each other party hereto.

F. Witnesses.

All witnesses whom the plaintiffs expect to call to testify, except those who may be called for impeachment purposes only, are:

Selman (Joe) Thomas, Jr.
David Bell
Dennis Canterbury
Curtis Cotton
Ressie Estell
Paul Flower
Donald Froien
Eddie Gill
Robert Hinsley
Josephine James
Ralph Johnson
Patricia Livengood
Percy Moore
Robert Peters
Sylvio Rebolloso
Wayne Shaffar
James Thompson
Clayton Welch
Gerald Carew
Melvin Wade, Jr.
Bernard Clausen
Marlin Lessman
Lloyd Anderson
Dale John Burk
John Conner
Michael DeJaynes
Robert Fillbach
David Foster
James George
Ivan Heesacker
Lewis Huston
Calvin Jewett
Kent Jorgensen
Clyde Moore
James Nash
John Pittman
Jane Reed
Paul Stone
James Walker
Ishanwee Wrenn
Thomas Hayden
James A. Doyle
Louis Church

All witnesses whom the Defendant Bakery, Confectionery and Tobacco Workers Union Local #433 expects to call to testify except those listed in the preceding as

expected to be called by the Plaintiff (sic), except those who may be called for impeachment purposes only are:

Bernard Clausen	Gary Wasinger
Louis Church	Bessie Sherrod
Karl Bonowski	Annie Moore
Barbara Griffin	[Harry Smith]

All witnesses whom the Defendant Metz Baking Company expects to call to testify except those listed in the preceding as expected to be called by the Plaintiff (sic), except those who may be called for impeachment purposes only are:

Marlin Lessman

G. Expert Witnesses.

None of the parties expect to call any expert witness with regard to this matter.

H. Depositions.

None of the parties expect to utilize any deposition except with regard to impeachment purposes.

I. Length of Trial.

Assuming that the case will be bifurcated with regard to damages which will not be tried to a jury, counsel estimates that the trial will consume not less than one and one-half days nor more than ~~three~~ [five] days and probably ~~two~~ [four] days.

/s/ C. Arlen Beam
Judge, U.S. District Court

APPROVED:

SELMAN (JOE) THOMAS JR., et al.

Plaintiffs,

By: /s/ Thomas J. Young
Thomas J. Young
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Tel: (402) 553-3535

ATTORNEY FOR PLAINTIFFS

METZ BAKING COMPANY,

Defendant,

By: /s/ Joe P. Cashen
Joe P. Cashen
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10306 Regency Parkway Drive
Omaha, Nebraska 68114
Tel: (402) 397-0203

ATTORNEY FOR DEFENDANT METZ BAKING COMPANY

BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL NO. 433,

Defendant,

By: /s/ MacDonald Smith
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632-640 Badgerow Building
Sioux City, Iowa 51101
Tel: (605) 336-1088

ATTORNEY FOR DEFENDANT BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL NO. 433

PLAINTIFFS' ELEMENTS OF PROOF

The elements of proof required by the Plaintiff with regard to the finding of liability against the Defendant Union is as follows:

1. That actions of the Defendant Union in investigating and processing the Plaintiffs' grievance up to and through arbitration were made without good faith and honesty of purpose or were made with hostile intent or in a discriminatory, arbitrary or perfunctory manner.

The elements of proof required by the Plaintiff with regard to the finding of liability against the Defendant Metz are as follows:

1. Finding of the liability with regard to the Defendant Union.
2. That the Collective Bargaining Agreement provided that the last person hired in the plant shall be the first person layed-off.
3. That utilizing plant-wide seniority, the Plaintiffs would not have been layed-off from their employment.

PLAINTIFFS' ELEMENTS OF PROOF IN REGARD TO THEIR CLAIMS AGAINST DEFENDANT UNION

1. That in regard to Defendant Union's investigation and processing of Plaintiffs' seniority claims and grievance or otherwise in their representation of Plaintiffs:

a. Defendant Union treated Plaintiffs and their claims discriminatory or with hostility; or

b. Defendant Union exercised its discretion in investigating and processing Plaintiffs' claims and grievance in bad faith or dishonestly, or

c. Defendant Union acted arbitrarily or in a perfunctory manner in its investigation and processing of Plaintiffs' claims and grievance.

2. That, if so, absent Defendant Union's conduct and actions in regard to Plaintiffs' claims and grieve (sic) either:

a. Defendant Metz would not have laid off Plaintiffs on March 8 and 22, 1983, or

b. Arbitrator Doyle would likely have sustained Plaintiffs' grievance.

APPENDIX L

IN THE MATTER OF ARBITRATION BETWEEN Metz Baking Company and The Bakery, Confectionary and Tobacco Worker's Union, Local No. 433	*Decision and Award*

The hearing in this matter was held on April 26, 1983 before James A. Doyle, Arbitrator, appointed by mutual agreement of the parties.

Appearances

For the Company

Joe P. Cashen, Esquire
Kennedy, Holland, Delacy & Svoboda
10306 Regency Parkway Drive
Omaha, Nebraska 68114

For the Union

Harry H. Smith, Esquire
632-640 Badgerow Building
Sioux City, Iowa 51101

Statement of Facts

The facts in this case are not in dispute. The Metz Baking Company, with its principal place of business in Sioux City, Iowa, operates bakery facilities in Sioux City, Omaha, and other locations in Nebraska, South Dakota, and Minnesota. The dispute in this proceeding involves its operations in Omaha, Nebraska. It's [sic] plant at 4383 Nicholas Street in Omaha produced and marketed under

the "Old Home" label. Its principal competitors in the Omaha area were the Interstate Brands Corporation, whose plant was located on Leavenworth Street, where bakery products were produced and marketed under the "Butter Nut" label; and ITT – Continental Baking Company, whose products bear the "Wonder Bread" label.

These baking companies are parties to an industry wide bargaining agreement with the Baking, Confectionery and Tobacco Worker's Union, Local No. 433, which represents employees engaged in the preparation, production, shipping, wrapping and packing of bakery products, and truck loaders and miscellaneous helpers.

In February 1983 the Metz plant on Nicholas Street was operating on a two and one-half shift basis with 78 full-time employees and 33 part-time employees. At the same time the Interstate Brands Corporation, with its principal place of business in Kansas City, Missouri, had 41 full-time employees and 21 part-time employees engaged in the production of bread and buns on a one shift per day basis at its plant on Leavenworth Street in Omaha. The Company was operating the plant at a substantial loss, which warranted a conclusion that if not disposed of, closure of the plant was probable, if not inevitable.

Sometime in January 1983 representatives of Interstate sought and entered into negotiations with representatives of Metz for the sale of its Omaha plant to Metz. Agreement was reached under the terms of which Metz acquired Interstate's plant, equipment, and its routes, but not its trucks. The sale was closed on February 19, and Metz took possession of the plant, equipment and routes

on February 21. The Union, it appears, was informed that the acquisition was being discussed, and if successful the two plants would be operated in tandem temporarily, its objective being to retain as much of the Butter Nut business as possible. After about two weeks of such tandem operation Metz closed its Nicholas Street plant and consolidated operations and equipment in the Interstate facility on Leavenworth Street because of its size and more modern equipment. The Nicholas Street plant was utilized thereafter as a truck storage facility.

In the move to the Interstate plant the reorganization resulted in the layoff of more than 40 of the employees on the Interstate seniority list. Metz treated the former Interstate employees as new hires and placed them at the bottom of the seniority list. However, the Company recognized their benefit rights under the industry contract, namely their accrued vacation rights, health and accident insurance benefits and pension rights. This reorganization gave preference to Metz employees with respect to job bidding, promotion, demotions, layoffs and recall rights.

The evidence establishes that during the first week of February 1983, production of bread and buns at the Metz plant amounted to 453,409 pounds, compared to 276,559 pounds produced at the Interstate plant. Based on these figures the production by Metz amounted to 62 percent of the combined production of the two plants.

A grievance was filed by the employees on the Interstate seniority list in which they alleged that the seniority provisions of the contract were unfairly and improperly

implemented by Metz. Restoration to their jobs in accordance with their seniority and with back pay was requested.

The Company's position is that in treating the employees of Interstate as new hires it was following its past practice and that of the industry. It supported this by testimony of numerous acquisitions of bakery routes by Metz from 1967 through 1980 in all of which the employees on such routes were considered as new hires. It contends that as the surviving company, and the largest of the two, to integrate the seniority lists would discriminate against loyal Metz employees, and confer a windfall on Interstate employees who were facing the probable loss of their jobs because of the financial condition of their employer.

The Union in this case has taken a neutral position because it is the bargaining representative of bakery employees under the identical contract signed by Metz and Interstate. Employees on the seniority list of Metz appeared and testified in support of the Company's action in treating Interstate employees as new hires. They argued that as employees of the surviving and dominant company they were following the work, and the integration of the Interstate employees on a one-to-one basis would be discriminatory and confer a windfall on the employees of a plant in a failing condition.

The Interstate employees, on the other hand argue that Metz agreed to assume the Union contract; the business is being carried on in the former Interstate plant; and it would be grossly inequitable to ignore their seniority rights. They argue that a fairer solution would

be the dovetailing of the two seniority lists. If dovetailing is not recognized, the minimal remedy should be entitlement to severance pay.

Statement of the Issue

The issue in this proceeding may be defined as follows:

> Did the Metz Baking Company violate the seniority rights of employees of the Interstate Brands Corporation when it acquired the assets of that Company, consolidated operations, and treated such employees as new hires. If so, what is the appropriate remedy?

Discussion

Arbitrators have wrestled with the problem of merging seniority lists in a wide variety of factual situations. In an effort to achieve an equitable solution involving a valuable contractual benefit, certain criteria for achieving that result have evolved. They have been identified as follows: 1) the surviving group principle; 2) the length of service principle; 3) the follow the work principle; 4) the absolute rank principle; and 5) the ratio rank principle. *Kennedy, Merging Seniority Lists,* BNA, *Labor Arbitration* and *Industrial Change,* 1963. What criterion will be found appropriate to achieve an equitable result will depend upon the particular facts and circumstances involved.

In approaching the issue in this case the following undisputed facts should be kept in mind.

First, Metz and Interstate are parties to the same bargaining agreement with Local No. 433 covering the

production employees. Plant wide seniority applies with respect to filling jobs, layoff, right to recall and other benefits. The contract does not contain any provisions defining the rights of employees if a plant is closed, or work is transferred from one plant or location to another, or what recognition, if any, shall be accorded employes if the employer disposes of its assets, or acquires the assets of another company by purchase, merger, or consolidation.

Second, the transaction between Metz and Interstate was a sale of assets to Metz, properly defined as an acquisition and not a merger or consolidation of the parties in the legal sense. There was, however, an economic consolidation of production operations in the larger and better equipped plant acquired by Metz.

Third, there was no agreement between the two companies with respect to the status of the Interstate employees upon the transfer of the assets of that Company to Metz.

Fourth, it appears that while negotiations for the purchase were in progress the Union, which represented both groups of employees, was informed by Metz that it intended to adhere to the practice followed in numerous prior acquisions of the routes of other companies, namely that the seller's employees would be regarded as new hires, with seniority dating from the date of acquisition. There is no evidence that the Union interposed any objection.

Fifth, it is uncontroverted that the Omaha plant of Interstate was in deep financial trouble, and faced probable liquidation if a sale could not be consummated.

We start with the legal premise, that seniority rights exist only by virtue of and to the extent provided by a bargaining agreement. *U.A.W. vs. Robertshaw Controls, Co.*, 405 F2d 29 (1968); *Interscience Encyclopedia, Inc.* 55 LA 210 (1970).

Of the criteria, which have evolved in dealing with the seniority right of the predecessor's employees in such cases, the Metz employees support the surviving group principle applied by the Company; and the Interstate employees advocate the application of the length of service principle to mitigate the inequity that is the result of tail-ending such employees. In other words, as the successor to Interstate, Metz should recognize their accrued length of service by dovetailing the two seniority lists. The rival positions of the two groups of employees is perfectly understandable. A review of a few arbitral decisions may help to place the issue in perspective.

In *Hubacker Cadillac, Inc.*, 57 LA 227 (1971), a case quite similar on its facts with the instant one, Hubacker bought the assets of another dealer. Both were parties to an industry wide contract. Upon transfer of the assets Hubacker did not recognize the vacation benefits accrued by the seller's employees under the Contract. The Union argued that the assets acquired by the seller included the seniority, stability and general productivity of the predecessor company. Arbitrator Updegraff answered this argument as follows:

> "The law seems to be well settled that there is no rule, principle or policy requiring an owner to agree to a substantive contractual provision obligating himself to be liable because of the seniority of the employee earned under another

> employer unless the later employer expressly obligates itself by an agreement."

There is no evidence of such an agreement with the Union in the instant case.

In a more recent case, *Weber Truck and Warehouse*, 66 LA 1029, the bargaining agreement to which they were subject contained a provision to the effect that if the employer absorbs the business of another Company or is a party to a merger, the seniority of the employee absorbed or affected shall be determined by mutual agreement between the employer and the Union involved. Failing to reach agreement arbitration was invoked. The Union contended that the employees affected by the acquisition were entitled to benefits accrued under the contract with the former employer but should be end-tailed for job security purposes. The surviving employer considered the employees of the seller as new employees and they were terminated during the probationary period. The arbitrator reached the following conclusion:

> "In the opinion of this Arbitrator and based on the weight of arbitral decision as well as the specific language of the Agreement, it would be improper to impose seniority obtained with one company and the benefits related thereto on another Company and its employees. The affected Davis employees shall have company seniority from the date of their employment by the Company."

The Arbitrator however, awarded the employees benefit rights (in this case vacation rights) accrued as employees of the predecessor.

Another recent case, *Carling National Brewers, Inc.*, 71 LA 476 (1978), involved the closing of a plant (Dillon) acquired three years earlier when Carling consolidated with the National Brewing Company. When the Dillon plant was closed the Company stated there would be openings for nine machinists at its Beltway plant and agreed to fill the openings with the nine most senior machinists at Dillon, integrating them on the seniority list on a one-to-one basis, the "absolute rank" method. The Union which represented employees at both plants under separate contracts objected on the ground that it would abrogate the seniority rights of Beltway employees. The Contract covering the Beltway plant did not deal with the question of seniority when production at two plants was consolidated, and there was no contract language supporting a merger of seniority lists on a "one-to-one" basis. If applied it would have resulted in a layoff of some Beltway employees. The Arbitrator concluded that under the circumstances the Company could not merge the seniority lists on the basis proposed. In support of his conclusion he cited *U.A.W. vs Robertshaw*, cited above, which held that in the absence of contract seniority rights generally do not survive a change in plant location. Although not specifically apposite to the facts in the instant case, the principle applied is not irrelevant.

Otto Milk Co., 51 LA 408 (1967) is an example of a case in which the merging companies were subject to identical contracts which addressed the problem faced here. The labor agreement provided that if the employer sells his entire business, or a part thereof, to another employer, the employees of the seller shall retain one half

of their seniority provided they have been in the employ of the seller of (sic) at least two years.

A case quite similar in many respects to the instant case is *Associated Brewing Co.* 40 LA 680 (1963). All of the Detroit brewery companies were parties individually to a uniform agreement with three Brewery Workers Locals in Detroit. Pfeiffer Brewing Co. and E & B Brewing Company merged under the name of Associated Brewing Company. Pfeiffer was the larger of the two and E & B was experiencing economic difficulties. With respect to the status of the employees of the two companies, the three local unions representing brewery workers in Detroit unanimously recommended dovetailing the two groups of employees. A small group of dissident employees adversely affected by the plan objected and the merged company and the Unions agreed to arbitration to afford those employees an opportunity to be heard. The Arbitrator held that dovetailing the lists was the most equitable way since the successor company continued to produce and market the brands of beer produced by Pfeiffer and E & B.

A reference to *Country Belle Cooperative Farmers,* 48 LA 60 involving a plant acquisition will conclude this review of arbitral decisions. The acquiring company proposed to integrate the employees on a one-to-one basis. The union objected, contending the non-union employees of the predecessor must go to the bottom of the list. The contract between the company and the Union was silent on the issue. The Arbitrator pointed out that the purchase involved a going enterprise and in balancing the equities of the two groups the employees of the acquired company should retain one half of their original seniority

provided they had been in the employ of the seller for at least two years.

In *N.L.R.B. vs Burns International Security Services,* 406 US 272 (1972) the question was whether in the case of an acquisition of assets or merger of two employers and the same operations are continued, the successor must take over the obligations of the predecessor's bargaining agreement. In overruling the N.L.R.B.'s decision that such obligations survived and bound the successor employer, the Supreme Court stated:

> "Such a duty does not, however, ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employer (sic) as his predecessor. . . .
>
> "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, work location, task assignment and nature of supervision. Saddling an employer with the terms and conditions contained in the old collective bargaining contract may make those changes impossible and may discourage and inhibit the transfer of capital."

This case and others make clear that the application of the so-called "successorship" doctrine will depend upon the circumstances of each case.

This Arbitrator has concluded that Metz, as purchaser of most, but not all, of the assets associated with Interstate's plant in Omaha, was not bound under the facts and circumstances to assume or recognize any obligations to Interstate employees under that Company's

bargaining agreement. The industry agreement, to which each subscribed made no provision for such an event. Although Metz agreed to recognize benefit rights which employees of Interstate had accrued prior to the transfer, it had informed the Union representing both groups of employees that those employees it might need in the enlarged operations would be recorded as new hires. The Union did not object and seek arbitration of the issue, as the Supreme Court has held it might have done. *John Wiley & Sons vs Livingstone,* 84 S.Ct. 909. Furthermore, this is not a case involving the acquisition of a thriving business, but on the contrary, a failing enterprise. Prospects of continued employment were bleak. Integration of Interstate employees on the seniority list by dovetailing would have resulted in the layoff of approximately three times as many Metz employees as former Interstate employees. Although it is difficult to achieve complete equity in merging seniority lists under any of the methods that have evolved, the hardship imposed on Metz employees would be severe and disruptive of harmonious labor relations. This Arbitrator is not unmindful of the fact that the surviving-group principle necessarily works severe hardship on the employees of the financially troubled seller, but in the absence of the sale the probability of loss of jobs by attrition and ultimate closing of the plant was imminent. Finally, the fact that Metz agreed to assume the obligations attributable to benefit rights accrued by Interstate employees under the contract negates any intention to assume other obligations under the old contract, including the grant of severance pay requested as a minimal remedy. Metz's action was in

accord with the Company's prior practice, and not in opposition to industry practice.

Award

The grievance is denied.

Dated this 7th day of June 1983.

/s/ James A. Doyle
Arbitrator

APPENDIX M

* * *

§ 8. National Labor Relations Act

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within [the sixty-day] ANY NOTICE period specified in this subsection, OR WHO ENGAGES IN ANY STRIKE WITHIN THE APPROPRIATE PERIOD SPECIFIED IN SUBSECTION (g) OF THIS SECTION shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for

such employee shall terminate if and when he is reemployed by such employer, WHENEVER THE COLLECTIVE BARGAINING INVOLVES EMPLOYEES OF A HEALTH CARE INSTITUTION, THE PROVISIONS OF THIS SECTION 8(d) SHALL BE MODIFIED AS FOLLOWS:

(A) THE NOTICE OF SECTION 8(d)(1) SHALL BE NINETY DAYS; THE NOTICE OF SECTION 8(d)(3) SHALL BE SIXTY DAYS; AND THE CONTRACT PERIOD OF SECTION 8(d)(4) SHALL BE NINETY DAYS.

(B) WHERE THE BARGAINING IS FOR AN INITIAL AGREEMENT FOLLOWING CERTIFICATION OR RECOGNITION, AT LEAST THIRTY DAYS' NOTICE OF THE EXISTENCE OF A DISPUTE SHALL BE GIVEN BY THE LABOR ORGANIZATION TO THE AGENCIES SET FORTH IN SECTION 8(d)(3).

(C) AFTER NOTICE IS GIVEN TO THE FEDERAL MEDIATION AND CONCILIATION SERVICE UNDER EITHER CLAUSE (A) OR (B) OF THIS SENTENCE, THE SERVICE SHALL PROMPTLY COMMUNICATE WITH THE PARTIES AND USE ITS BEST EFFORTS, BY MEDIATION AND CONCILIATION, TO BRING THEM TO AGREEMENT. THE PARTIES SHALL PARTICIPATE FULLY AND PROMPTLY IN SUCH MEETING AS MAY BE UNDERTAKEN BY THE SERVICE FOR THE PURPOSE OF AIDING IN A SETTLEMENT OF THE DISPUTE.